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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 886.

THE EASTERN BAND OF THE CHEROKEE INDIANS, APPELLANT,

vs.

THE UNITED STATES AND THE CHEROKEE NATION, COMMONLY CALLED THE CHEROKEE NATION WEST.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 16, 1885.

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1 I. *Petition. Filed May* 11, 1883.

In the Court of Claims.

THE EASTERN BAND OF THE CHEROKEE INDIANS
versus
THE UNITED STATES. } No. 13828.

To the honorable the Chief Justice and judges of the United States Court of Claims:

Your petitioner, The Eastern Band of the Cherokee Indians, in its own behalf, and in behalf of and for the benefit of all the Cherokee Indians now residing in the States east of the Mississippi river, and interested in the subject-matter of this petition, respectfully represents:

I.

That this petition is presented and filed, and the jurisdiction of this court is invoked, under and by virtue of the provisions of the act of Congress entitled "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30th, 1883, and for prior years, and for those certified as due by the accounting officers of the Treasury, in accordance with section
2 4, of the act of June 14, 1878, heretofore paid for permanent appropriations, and for other purposes," approved March 3d, A. D. 1883.

The provisions of the said act, so far as relate to the said jurisdiction, are in the words, following, to wit:

"Be it enacted in the Senate and House of Representatives of the United States of America, in Congress assembled, That the Eastern Band of Cherokee Indians is hereby authorized to institute a suit in the Court of Claims against the United States to determine the rights of the said band in and to the moneys, stock, and bonds held by the United States in trust for the Cherokee Indians, arising out of the sales of lands lying west of the Mississippi river, and also in a certain other fund, commonly called the permanent annuity fund, to which suit the Cherokee Nation, commonly called the Cherokee Nation West, shall be made a party defendant. The said Eastern Band shall within three months after the passage of this act file a petition in said court, verified by the principal chief of said band, setting forth the facts upon which said claim is based. The said Cherokee Nation West shall within six months after the passage of this act file its answer to said petition, and said cause shall proceed to final determination pursuant to the practice in said court, and such rules or orders as the said court may make in that behalf.

"The Secretary of the Interior shall transmit to said court for the consideration of said court copies duly certified of all records, reports, papers, and other documents on file in the Department of the Interior which he may deem necessary to said cause, or which may be required by either of the parties hereinbefore referred to, and the said parties, respectively, may take and submit to said court such additional competent testimony as they may desire. And jurisdic-

tion is hereby conferred upon said court to hear and determine what, if any, interest, legal or equitable, the said Eastern Band has in said moneys, stocks, bonds so held in trust as aforesasd by the United States, and shall enter a decree specifically defining the rights and interests of the said Eastern Band therein, and in any moneys hereafter to be derived from sources similar to those out of which the existing fund arose.

3 "When the interest, if any, of the said Eastern Band has been ascertained as aforesaid, the Secretary of the Treasury shall, out of the portion of said fund adjudged to said parties, respectively, pay all the proper costs and expenses of said respective parties of the proceedings herein provided for, each, except the United States, to be liable for its own costs and expenses, and the remainder shall be placed to credit of the said Eastern Band and of the Cherokee Nation, in accordance with their respective rights as ascertained by the said judgment and decree of said court.

"In the said proceeding the Attorney General, or such of his assistants as he may designate, shall appear on behalf of the United States. Either of the parties to said cause may appeal from any judgment rendered by said Court of Claims to the Supreme Court of the United States, and the said courts shall give such cause precedence."

And pursuant to the provision of said act in that behalf, the said Cherokee Nation West is made a party defendant to this petition for the purposes therein specified.

II.

The said claimant, "The Eastern Band of Cherokee Indians," further represents that the said Eastern Band and the said Cherokees residing east of the Mississippi river are a part of the Cherokee Nation of Indians; such Cherokee Nation being one of the tribes of Indians recognized by the Constitution, treaties, and laws of the United States as a tribe and nation of Indians, by and under that name, and as such, at and before the organization of the Government of the United States, occupying lands within the territory and jurisdiction of the United States at and after the adoption of the Constitution of the United States.

That at and before the adoption of the Constitution of the United States the said "Cherokee Nation" possessed, occupied, and

4 owned a large body of land situated in the States of North Carolina, South Carolina, Georgia, Alabama, and Tennessee; and which lands were recognized as belonging to them by the treaty concluded at Hopewell between the United States of America and the Cherokee Nation on the 28th of November, 1785 (7 Stat., 18), the 4th article of which treaty allotted to the said Cherokee lands therein described, embracing many millions of acres; and by virtue of the said treaty the right and title of the said Cherokee Nation, embracing all the members, individuals, and persons composing the said tribe, were fully established and recognized by the Government of the United States.

III.

Petitioner further avers that by subsequent treaties hereinafter specifically mentioned, and parts thereof specifically set forth, the lands embraced in the above-named reservation, bounded and described in said article "four" of said treaty of the 28th of November, 1875, and which was the property of the whole Cherokee people, were, from time to time, ceded, sold, and relinquished to the United States by the said Cherokees for money, merchandise, and for other lands which, in like manner, become common property of all the Cherokee people.

The first session of a part of the reservation described in said article four was made to the United States, by article four of the treaty of July 2d, 1791 (7 Stat., 39); in consideration of which the United States agreed to pay the Cherokee Nation the sum of one thousand dollars annually, as stipulated in said article four (7 Stats., 40).

This annuity of $1,000 was, by an additional article to the said treaty, such additional article being of date 17th February, 1792 (7 Stats., 42), increased to the sum of $1,500 per annum.

By article three of the treaty with the said Cherokees of
5 June 26th, 1794, proclaimed the 21st of January, 1795 (7 Stats., 43), the said permanent annuity was increased as follows: "In lieu of all former sums to be paid annually to furnish said Cherokee Indians with goods suitable to their use to the amount of $5,000 yearly."

By article six of the treaty proclaimed October 2d, 1798 (7 Stats., 62, 63), the said annuity of $5,000 was increased by $1,000, making an annuity of $6,000 in goods; this increase being in consideration for a cession of land named in article four of said treaty.

By the treaty proclaimed 17th of May, 1824, concluded on the 24th day of October, 1804 (7 Stats., 228), other portions of the said reservation were ceded to the United States, in consideration of which the United States agreed to "cause to be delivered to the Cherokees useful goods, wares, and merchandise to an amount of $5,000, or that sum in money at the option (timely signified) of the Cherokees; and shall also cause to be delivered annually to them other useful goods to the amount of $1,000, or money to that amount, at the option of the Cherokees, timely notice thereof being given, addition to the annuity heretofore stipulated, and to be delivered at the usual time of receiving their annuity."

By article two of the treaty of the 25th of October, 1805, proclaimed the 24th of April, 1806 (7 Stats., 93), the Cherokees ceded to the United States another large tract of land, in consideration of which cession the United States, in article 3 of said treaty, agreed to "pay immediately $3,000 in valuable merchandise, and $11,000 within ninety days after the ratification of this treaty; and also an annuity of $3,000, the commencement of which is this day."

These permanent annuities so secured to the entire Cherokee Nation, in consideration as aforesaid, were in consideration for the cessions of lands belonging to the entire nation; and the said
6 permanent annuity increased to the sum of $10,000 was likewise the property of the entire Cherokee Nation.

IV.

Claimant further says that up to the time of the treaty last aforesaid, and to the time when said permanent annuity was increased to the said sum of $10,000, the said Cherokee Nation remained one tribe, band, or nation. That in the autumn of the year 1808, as appears in the preamble of the treaty of 8th of July, 1817 (7 Stat., 156), a deputation of Cherokees from the "upper Cherokee towns," and also a deputation from the "lower Cherokee towns," duly authorized by the nation, visited the city of Washington; those from the upper Cherokee towns going for the purpose of declaring to the President of the United States their anxious desire to engage in the pursuits of agriculture and civilized life in that country; the deputation from the lower towns going for the purpose of making known to the President their desire to continue the hunter's life, and to remove across the Mississippi river, where game was more abundant.

The President of the United States, after considering the petitions of both above parties, on the 9th day of January, 1809, replied to these deputations, in substance, that the United States was the friend of both parties, and was willing, as far as was reasonable, to comply with the wishes of both; that those who remained should have the patronage, aid, and good neighborhood of the United States; that those who wished to remove were permitted to send an exploring party to reconnoitre the country on the waters of the Arkansas and White rivers. In pursuance of this policy, thus expressed by the President, a treaty was concluded at the Cherokee Agency on the 8th of July, 1817, between the United States and the chiefs, headmen, and warriors of the Cherokee Nation east of the
7 Mississippi river, and the chiefs, headmen, and warriors of the Cherokees west of the Mississippi river, for the purpose of "carrying into effect the before-recited promises," and "for the purpose of making an equal distribution of the annuities secured to be paid by the United States to the whole Cherokee Nation and for the other purposes expressed in the said treaty (7 Stats., 156). The third article of the said treaty provided, in substance, that during the month of June, in the year 1818, a census should be taken of the whole Cherokee Nation in the following manner: "That the census of those on the east side of the Mississippi river who declare their intention of remaining shall be taken by a commissioner appointed by the President of the United States and a commissioner appointed by the Cherokees on the Arkansas river, and a census of the Cherokees on the Arkansas river and those removing there, and who at that time declare their intention of removing there, shall be taken by a commissioner appointed by the President of the United States, and one appointed by the Cherokees east of the Mississippi river."

And by article 4 of said treaty it was stipulated that the "annuity due from the United States to the whole Cherokee Nation for the year 1818 is to be divided between the two parts of the nation in proportion to their numbers, agreeably to the stipulations contained in the third article of this treaty, and to be continued to be divided thereafter in proportion to their numbers, and the lands to be ap-

portioned and surrendered to the United States, agreeably to the aforesaid enumeration, as the proportionate part agreeably to their numbers, to which those who have removed, and who declare their intention to remove, have a just right, including these with the lands ceded in the first and second articles of this treaty."

To avoid the expenses of taking the census provided by the said treaty of the 8th of July, 1817, it was stipulated in article 6
8 of the treaty with the Cherokees of the 27th of February, 1819, proclaimed the 10th of March, 1819 (7 Stats., 197), that "the annuity to the Cherokee Nation shall be paid—two-thirds to the Cherokees east of the Mississippi and one-third to the Cherokees west of that river; as it is estimated that those who have emigrated, and who have enrolled for emigration, constitute one-third of the nation; but if the Cherokees west of the Mississippi river object to this distribution, of which due notice shall be given them before the expiration of one year after the ratification of this treaty, then a census, solely for distributing the annuity, shall be taken at such times and in such manner as the President of the United States may designate. By the eleventh article of the treaty between the United States and the chiefs, headmen, and people of the Cherokee tribe of Indians, dated December 29th, 1835, proclaimed May 23d, 1836 (7 Stats., 478), it is provided that "the Cherokee Nation of Indians, believing it to be for the interest of their people to have all their funds and annuities under their own direction and future disposition, hereby agree to commute their permanent annuity of $10,000 for the sum of $214,000, the same to be invested by the President of the United States, as a part of the general fund of the nation, and their present school fund, amounting to about $250,000, shall constitute a part of the permanent school fund of the nation."

By an act of Congress approved the 2d of July, 1836 (5 Stat., 73), an appropriation was made in the words following: "For commutation of the permanent annuity of $10,000, according to the eleventh article of the said treaty, $214,000."

Claimant, The Eastern Band of the Cherokee Nation, represents that, by the acts and proceedings above mentioned, and by and in virtue of the treaty provisions aforesaid, and the acts of Congress above mentioned, the said Cherokee Nation became divided into two parts or bands, known respectively as the "Eastern Band of
9 the Cherokee Nation" and the "Cherokee Nation West," and under and in virtue of the cessions of land aforesaid, and the considerations allowed and paid therefor by the United States, the said entire nation became entitled to the said permanent annuity and to the said commutation of $214,000 made in lieu thereof, and to all payments of interest thereon, such commutation and interest thereon to be divided between the said two bands in proportion to the numbers belonging to such bands, respectively, and the said two bands ever since they became so divided have been so entitled to the said commutation and interest thereon.

And claimant further avers that the said Eastern Band has been and is fully recognized by the Executive and Legislative Departments, and by the treaty-making power of the Government of the

United States as members of the Cherokee Nation, and as a separate and distinct band of such nation, and such separate band of Eastern Cherokees is expressly recognized as such band in sections two and three of the act of Congress approved July 27th, 1868, which provides as follows:

"Section 2. Be it further enacted, That the Secretary of the Interior shall cause a new roll or census to be made of the North Carolina or Eastern Cherokees, which shall be the roll upon which payments due the said Indians shall be made.

"Section 3. And be it further enacted, That the Secretary of the Interior shall cause the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern or North Carolina tribe of Cherokees as of other tribes of Indians."

Claimant further represents that ever since the said commutation of the said permanent annuity by the said treaty, and by the act of Congress of July 2d, 1836, into the said sum of $214,000, the United States has held and retained the said fund of $214,000 in trust for the said Cherokee Nation, and still holds the same as aforesaid, for the use and benefit of said entire nation, including the said Eastern Band of Cherokee Indians and the said Western Band of Cherokee Indians, the interest of the said bands, respectively, and of the persons composing the same, being in proportion to the number of persons composing the said bands respectively.

Petitioner further represents that the number of persons composing the said "Eastern Band of Cherokees," as near as petitioner can now state, is 2,500, and the numbered persons composing the said "Western Band of Cherokees," as near as petitioner can now state, is 15,000, and at no time since the separation of the said band has the proportion of the said "Eastern Band" to the said "Western Band" been less than the proportion just stated; but on the contrary, the proportion of the said Eastern Band has hitherto, during all of the time since said separation until very recently, been larger than it is at the present time as aforesaid.

Petitioner further avers that the proportion of all of said commutation fund and of all interest paid heretofore, or which is now due, or which may hereafter become due and payable on such fund, which belongs to and was and is the property of the "Eastern Band," is, as near as petitioner can now state, one-seventh thereof, and is certainly not less than that proportion, and the said Eastern Band is entitled in this action to recover at least said one-seventh of the said commutation fund and a like proportion of all of said interest thereon paid and to be paid.

Petitioner will ask the court to allow an amendment to this petition regarding the proportionate numbers of the said Eastern and Western Band, if before the hearing hereof the evidence taken should disclose that the above proportion is inaccurate.

Petitioner further represents that notwithstanding the wrongful and illegal payments made by the United States, as hereinafter set forth, there yet remains and now is in the possession of the Government of the United States large sums of money, and which moneys are held by the United States in trust for and

are owned by the said entire Cherokee Nation, including both of said bands, such ownership of the nation, however, being subject to the equities and rights of petitioner to be paid therefrom its full and entire proportion of said moneys, beginning with the beginning of the said payments to said Western Band, as hereinafter set forth.

Petitioner further represents that the United States has hitherto paid to the "Western Band of the Cherokee Indians," as interest due from the said investments by the United States of the said commutation fund of $214,000, all the interest which the United States derived from the said last-named sum, and also that which the United States assumed to pay, and has paid no part of such interest to the said Eastern Band, such payments of interest to the said Western Band being in violation of the rights of said Eastern Band to its proportion of the said interest as such proportion is above set forth, to wit, one-seventh thereof or more.

Petitioner further avers that the said amount of interest so due from the United States, as interest upon the said $214,000, has been the sum of $12,840 per year, beginning July 2d, 1836, and continuing down to the present time, and the United States in each year, beginning with the said year 1836, wrongfully and illegally paid to the Western Band of Cherokees the entire sum of $12,840 per annum, and wholly denied and deprived the said Eastern Band of its entire proportion of interest and property aforesaid in the said annual payments, this notwithstanding the said Eastern Band has constantly and from the beginning of the said wrongful payments protested against the same, and against the said exclusion of the said Eastern Band from its share of the said annual payments.

Petitioner further represents that the following are the
12 sums of money arising out of said commutation fund belonging to the said Eastern Band of Indians, which have been paid by the United States to the said Western Band, and also the dates of the payments respectively, and which respective payments petitioner is entitled to have awarded and to recover in this action from the United States out of the trust money in its possession as herein stated, together with interest at six per cent. per annum on the said respective payments from the dates of such payments respectively, viz:

Permanent annuity fund as commuted	------	$214,000 00
Pro rata share of the Eastern Cherokees, estimated at one-seventh	------	30,571 43
Interest on pro rata share of Eastern Cherokees from July 2, 1836, to July 2, 1882, at six per centum	$88,045 44	
Interest on annual amounts ($1,834.28) due Eastern Cherokees arising from their pro rata share of said fund, computed for each year at six per cent. from July 2, 1836, to July 2, 1882	124,247 35	
		212,292 79
Total principal and interest due Eastern Cherokees	------	$242,864 22

Your petitioner, by way of setting forth a further claim, additional to that for annuity and interest thereon, as hereinbefore set forth, further saith: That prior to the separation of the Cherokee Nation into two bands, as hereinbefore set forth, and prior to the partition of the said lands, described in article four of said treaty of Hopewell of the 28th of November, A. D. 1785 (7 Stats., 19), between the said Eastern Band and Western Band of the Cherokee Nation, through the provisions of the treaty of A. D. 1817 and 1819, as hereinafter set forth, the said entire nation, as to the entire body of land described in said article four of said treaty of Hopewell,

13 held therein an "absolute title, subject only to the pre-emption right of purchase acquired by the United States as successor of Great Britain;" and such title of said entire Cherokee Nation in and to all said land hath at all times, since the establishment of the Government of the United States, been fully recognized, declared, and established by the said government and by all the departments thereof.

Petitioner avers that the said entire Cherokee Nation, being, prior and up to the 8th day of July, A. D. 1817, such absolute owner of all of said land described in said article four of said treaty of Hopewell, *the said Cherokee Nation*, on the day last aforesaid, entered into a treaty with the United States, the preamble of which recites, amongst other things, the above-named correspondence, in the autumn of 1808, between the two delegations of said nation and the President of the United States regarding the separation of said Cherokee Nation. By articles one and two of the said treaty (7 Stats., 157) the said Cherokee Nation, acting through the chiefs, headmen, and warriors of the part of the nation east of the Mississippi river, and through the chiefs, headmen, and warriors of the Cherokees on the Arkansas river, ceded to the United States very large tracts of their said lands, as set forth in said articles. Article three provided for a census, during June of the year 1818, of the whole nation, such census to be so taken as to show the number of Cherokees east of the Mississippi, and of those who should declare their intention to remain east of the Mississippi; and also to show the number of Cherokees on the Arkansas river, and of those who should declare their intention of removing there. The fourth article, amongst other things, provides that the lands to be apportioned and surrendered to the United States by the treaty should be apportioned and surrendered agreeably to the numbers shown by said census as belonging to the Eastern and Western Bands.

14 Article five of said treaty provided, amongst other things, as follows: "Art. 5. The United States bind themselves, in exchange for lands ceded in the first and second articles hereof, to give to that part of the Cherokee Nation on the Arkansas river as much land on the said river and White river as they have or may hereafter receive from the Cherokee Nation east of the Mississippi, acre for acre, as the just proportion due to that part of the nation on the Arkansas agreeably to their numbers." * * * "And it is further stipulated that the treaties heretofore made between the Cherokee Nation and the United States are to continue in full force

with both parts of the nation, and both parts thereof to be entitled to all the immunities and privileges which the old nation enjoyed under the aforesaid treaties."

By a treaty of the 27th of February, 1819, between the Cherokees and the United States, supplementary to the said treaty of July 8th, 1817, it is recited in the preamble that the "greater part of the Cherokee Nation have expressed an earnest desire to remain on this" (the east) "side of the Mississippi," * * * "and that the said treaty of 1817 might, without the trouble and expense of taking said census, be finally adjusted," and that said Cherokees have offered to cede to the United States a tract of country at least as extensive as that which they "(the United States)" probably are entitled to under its provisions, the contracting parties have agreed to conclude the following articles:

By article one the Cherokee Nation ceded to the United States a large tract of land described in said articles, and at the conclusion of said article it is declared that the said cessions "are in full satisfaction of all claims which which the United States have on them on account of the cession to a part of their nation who have or may hereafter emigrate to the Arkansas, and this treaty is a final adjustment of that of the 8th of July, 1817."

15 Petitioner further evers that under and in virtue of all the provisions of the said treaties of 1817 and 1819, the land on the east side of the Mississippi river, theretofore the common property of the Cherokee Nation, was partitioned between the Eastern and Western Bands of said nation; and the Western Cherokees exchanged their portion of that land with the United States for land on the Arkansas and White rivers, acre for acre; and the residue of the Cherokee country on the east side of the Mississippi river not ceded to the United States by these treaties through the operation of such treaties were conceded, transferred, partitioned, assigned, and set over to the absolute and exclusive ownership of the said Eastern tribe of Cherokees, with an engagement in the fifth article binding the United States to protect such Cherokees from intrusion on their land by white people.

V I.

Your petitioner further avers, that after the making of these treaties of 1817 and 1819, disturbances of a threatening character arose between the Cherokees in Arkansas and other States, and in Territories, as appears in the preamble to the treaty of the 6th of May, 1828 (7 Stats., 311), and otherwise; hence the Cherokees and the United States became anxious to put an end to such difficulties, and therefore adopted the policy towards the Cherokees, of removing them beyond the limits of the States and organized Territories, and in pursuance and in execution of such policy, so far as that policy could in justice to the rights of the Indians be carried out, the United States made with the Cherokees the treaties of the 6th of May, 1828 (7 Stats., 311), and of February 14th, 1833 (7 Stats., 414), and of December 29th, 1835 (7 Stats., 478), which are hereinafter specifically mentioned.

VII.

16 In article two of the said treaty of 1828, made by the United States with the chiefs and headmen of the Cherokee Nation of Indians west of the Mississippi river, it was stipulated as follows:

"Article 2. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged of, seven million of acres of land to be bound as follows."

The article then described, by metes and bonds, the said lands so "granted to the Cherokees," being land west of the western boundary of the State of Arkansas; and the article concludes in these words: "In addition to the seven million of acres thus provided for and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west; and a free and unmolested use of all the country lying west of the western boundary of the above-described limits; and as far west as the sovereignty of the United States and their right of soil extend."

By the seventh article of this treaty of 1828, the chiefs and headmen of the Cherokee Nation agree to "give up, and they do hereby surrender to the United States, and agree to leave the same within fourteen months, as hereinbefore stipulated, all the lands to which they are entitled in Arkansas; and which were secured to them by the treaty of 8th of January, 1817, and the convention of the 27th February, 1819."

The preamble to the said treaty of the 6th of May, 1828, expressly declares the object of the said cession of land to the Cherokees as made by this treaty, to be "To secure to the Cherokee Nation of Indians, as well as those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who
17 reside in States east of the Mississippi and who may wish to join their brothers of the west, a permanent home, and which shall, under the most solemn guarantee of the United States, be and remain their's forever." This cession of the said seven millions of acres of land and the said outlet west was not made to any separate or distinct tribe of the said Cherokees, but to "the Cherokees."

The treaty of the 14th of February, 1833, between the United States and the chiefs and headmen of the Cherokee Nation west of Mississippi river repeated and renewed the guarantee respecting the seven million acres of land named as conceded by the treaty of 1828, and also the cession of the said outlet west. It redefined the boundaries of the said seven millions of acres, and provided that letters patent for the ceded lands should be issued as soon as practicable. (7 Stats., 415.)

VIII.

On the 29th of December, 1835, at New Echota, in the State of Georgia, the United States entered into a treaty with the Cherokee Nation, such nation being represented by the chiefs and headmen of the Eastern Band of the Cherokees, and also by delegates duly au-

thorized and empowered to represent the Western Cherokees. The preamble to this treaty recites, amongst other things, the following: "That the Cherokees were anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State governments may be terminated and adjusted;" also the desire of the Cherokees of reuniting their people in one body and securing a permanent home where they can establish a government of their choice."

It also recites certain agreements to submit to the Senate au-
18 thority to make an award as to what sum ought to be allowed to the Cherokees for a cession of their lands east of the Mississippi, and that the Senate had made an award of five millions of dollars in pursuance of the said submission; and further recites various other transactions which led up to the making of the treaty of the 29th of December, 1835, at New Echota.

Article 1 of the said treaty contains the following provision:

"Article 1. The Cherokee Nation hereby cede, relinquish, and convey to the United States all the lands owned, claimed, or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoliations of every kind for and in consideration of the sum of five millions of dollars, to be expended, paid, and invested in the manner stipulated and agreed upon in the following articles." * * *

"Article 2. Whereas by the treaty of May 6th, 1828, and the supplementary treaty thereto of February 14th, 1833, with the Cherokees west of the Mississippi, the United States guaranteed and secured to be conveyed by patent to the Cherokee Nation of Indians the following tract of country: Beginning at a point on the old western territorial line of Arkansas Territory, being twenty-five miles north from the point where the territorial line crosses Arkansas river; thence running from said north point south on the said territorial line where the said territorial line crosses Verdigris river; thence down the said Verdigris river to the Arkansas river; thence down said Arkansas river to a point where a stone is placed opposite the eastern or lower bank of Grand river at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a straight line to a point four miles northerly from the mouth of the North Fork of the Canadian; thence along the said four-mile line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river and running thence with the western line of Arkansas Territory, as now defined, to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand river;
19 thence up said Grand river as far as the south line of the Osage reservation, extended if necessary up and between said south Osage line, extended west if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which

a line running north and south from said Osage line to said due west line make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres as far west as the sovereignty of the United States and their right of soil extend.

"And letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed; and whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of $500,000 therefor, hereby covenant and agree to convey to the said Indians and their descendants, by patent in fee simple, the following additional tract of land, situated between the west line of the State of Missouri and the Osage reservation, beginning at the southeast corner of the same and runs north along the east line of the Osage lands fifty miles to the northeast corner thereof, and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning, estimated to contain 800,000 acres of land; but it is expressly understood that if any of the lands assigned the Quapaws shall fall within the aforesaid bounds, the same shall be reserved and excepted out of the lands above granted, and a *pro rata* reduction shall be made in the price to be allowed to the United States for the same by the Cherokees."

Your petitioner represents that under and by virtue of the terms and provisions of the said treaty of the 29th of December, 1835, the said lands described in article 2 of the said treaty became and were the property of the entire Cherokee Nation, the same being paid for by the common property of the entire nation, as such considerations are set forth in said treaty.

IX.

Your petitioner further avers that whatever uncertainty or doubt may have existed in regard to the rights of the Western Band of the Cherokee Nation in the said lands ceded by the said treaty of 1835 to the Cherokee Nation prior to the treaty of the 6th of August, 1846, (9 Stats., 871,) such doubts were removed by the provisions of the last-named treaty concluded at Washington between the United States and the representatives of each band of the Cherokee Nation. The said treaty recites that difficulties have for a considerable time existed between the different portions of the people constituting and recognized as the Cherokee Nation of Indians, which it is desirable should be speedily settled, &c. Article 1 provides that "the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit, and a patent shall be issued for the same, including the 800,000 acres purchased, together with the outlet west promised by the United States in conformity with the provisions relating thereto contained in the third

article of the treaty of 1835 and in the third section of the act of Congress approved May 28, 1830."

Article 2 provides that "all difficulties and differences heretofore existing between the several parties of the Cherokee Nation are hereby settled and adjusted and shall, as far as possible, be forgotten and forever buried in oblivion."

Article 4 contains the following provisions:

"And whereas it has been decided by the board of commissioners recently appointed by the president of the United States to examine and adjust the claims and difficulties existing against and between the Cherokee people and the United States, as well as between
21 the Cherokees themselves, that under the provisions of the treaty of 1828, as well as in conformity with the general policy of the United States in relation to the Indian tribes, and the Cherokee Nation in particular, that that portion of the Cherokee people known as the 'old settlers' or 'Western Cherokees' had no exclusive title to the territory ceded in that treaty, but that the same intended for the use of, and to be the home for, the whole nation, including as well that portion then east as that portion then west of the Mississippi; and whereas the said board of commissioners further decided that inasmuch as the territory before mentioned became the common property of the whole Cherokee Nation by the operation of the treaty of 1828, the Cherokees then went west of the Mississippi by the equitable operation of the same treaty acquired a common interest in the lands occupied by the Cherokees east of the Mississippi river, as well as in those occupied by themselves west of that river, which interest should have been provided for in the treaty of 1835, but which was not, except in so far as a constituent portion of the nation, retained in proportion to their numbers a common interest in the country west of the Mississippi, and in the general funds of the nation; and, therefore, they have an equitable claim upon the United States for the value of that interest whatever it may be. Now, in order to ascertain the value of that interest, it is agreed that the following principle shall be adopted, viz: All the investments and expenditures which are properly chargeable upon the sums granted in the treaty of 1835, amounting in the whole to five millions six hundred thousands dollars (which investments and expenditures are particularly enumerated in the fifteenth article of the treaty of 1835), to be first deducted from said aggregate sum, thus ascertaining the residue or amount which would, under such marshalling of accounts be left for *per capita* distribution among Cherokees emigrating under the treaty of 1835, excluding all extravagant and improper expenditures, and then allow to the old settlers (or western Cherokees) a sum equal to one-third part of said residue to be distributed, *per capita*, to each individual of said party of 'old settlers' or 'western Cherokees.'"

"In the consideration of the foregoing stipulation on the
22 part of the United States the 'Western Cherokees' or 'old settlers' hereby release and quit claim to the United States all right, title, interest, or claim they may have to a common property in the Cherokee lands east of the Mississippi river, and to ex-

clusive ownership to the lands ceded to them by the treaty of 1833 west of the Mississippi, including the outlet west; the said lands, together with the eight hundred thousand acres ceded to the Cherokees by the treaty of 1835, shall be and remain the common property of the whole Cherokee people, themselves included."

Article 8 of the treaty is as follows:

"The United States agree to pay to the Cherokee Nation the sum of $2,000 for a printing press, materials, and other property destroyed at that time; the sum of $5,000, to be equally divided among all those whose arms were taken from them previous to their removal west by order of an officer of the United States, and the further sum of $20,000 in lieu of all claims of the Cherokee Nation as a nation prior to the treaty of 1835, except all lands reserved by treaties heretofore made for school funds."

Article 9 provides as follows: "The United States agree to make a fair and just settlement of all moneys due to the Cherokees and subject to the *per capita* division under the treaty of 29th of Dec., 1835, which said settlement shall exhibit all money properly expended under said treaty, and shall embrace all sums paid for improvements, ferries, spoliations, removal, and subsistence commutation therefor, debts, and claims upon the Cherokee Nation of Indians, for the additional quantity of land ceded to said nation and the several sums provided in the several articles of the treaty to be invested as the general funds of the nation, and also all sums which may be hereafter properly allowed and paid under the provisions of the treaty of 1835. The aggregate of which said several sums shall be deducted from the sum of six million six hundred and forty-seven thousand and sixty-seven dollars, and the balance thus found to be due shall be paid over *per capita* in equal amounts to all those individuals, heads of families, or their legal representatives, entitled to receive the same under the treaty of 1835 and the supplement of 1836, being all those Cherokees residing east at the date of said treaty and the supplement thereto."

23 Article 10 provides, in substance, that nothing in this treaty shall "take away or abridge any rights or claims which the Cherokees now residing in States east of the Mississippi river had, or may have, under the treaty of 1835 and the supplement thereto."

Your petitioner further avers that under and in virtue of the said treaty of August 17th, 1846, and the said prior treaty of 1835, the said Eastern Band of the Cherokee Nation, the petitioner, became, and now is, entitled equally and *pro rata* with the residue of the said nation to a common and equal property in the Cherokee lands ceded to the Cherokees by the said treaties of 1828 and 1833 and 1835, including the 800,000 acres ceded to the Cherokees by the last-named treaty, and also in and to the said outlet west; and that your petitioner is entitled, in virtue of such ownership in the said lands, and has been ever since the making of the said treaty whereby the said lands west of Arkansas and Missouri were conceded to the Cherokees, to their equal *pro rata* share and proportion of the proceeds of

the sales of any part of the said lands, and also of the said proceeds of the said outlet west.

And your petitioner further avers that whenever any of the said lands are no longer used as a home for the Cherokees, and whenever heretofore any of the said lands have been sold or shall be hereafter sold, in pursuance of any treaty stipulations or of any laws of the United States or otherwise, your petitioner, as a portion of the said Cherokee nation, was, and now is, entitled to share equally *pro rata* in the proceeds of the said sales, and in all property, moneys, and considerations of every description derived therefrom, and in all interest accruing thereon, and in all investments made of the proceeds of such sales with the said Western Band of the Cherokees.

Your petitioner further avers that in this right of your petitioner to participate *pro rata* in all the proceeds of such sales all
24 Cherokees residing east of the Mississippi river are entitled to share equally with you petitioner and *pro rata*, they being part of said band.

X.

Your petitioner further avers that by articles 15, 16, and 17 of the said treaty, concluded on the 19th day of July, 1866, and proclaimed on the 11th day of August, 1866, provision was made for the disposing of lands owned by the said Cherokee Nation, as will more fully and at large appear by reference to the said articles; and by article twenty-three of said treaty provision was made for the investment by the United States for the benefit of the said Cherokee Nation of the moneys arising out of such disposition of said lands, as will more fully appear by reference to said article twenty-three.

XI.

That under and by virtue of the provisions of the said articles 15, 16, and 17, and under and by virtue of the provisions of the laws of the United States, lands belonging to said Cherokee Nation were sold and disposed of for the considerations hereinafter specifically named, that is [to] say:

1st. Of the said lands denominated neutral lands, estimated in article 2 of the treaty of Dec. 29th, 1835, to contain 800,000 acres, there were sold by the United States 799,614.72 acres for the gross sum of $944,747.56, and the net proceeds of which were $859,304.79.

The sum of $859,304.79, the net proceeds, was invested and paid out for the benefit of the Cherokee Nation West, as follows:

25

July 1.	Amount used in the payment of the National warrants	$33,860 12
Dec. 10.	Amount invested in $96,381.93 U. S. loan of 1864	103,224.99
1869.		
Feb'y 18.	Amount invested in $64,700 U. S. loan of 1865	71,493 50

Nov. 29.	Amount invested in $76,700 U. S. loan of 1865	$86,908 87
Dec. 10.	Amount invested in $60,050 U. S. loan of 1864–'65	67,312 75
" 13.		
" 27.		
1870		
Jan'y 28.	Amount invested in $26,100 U. S. loan of 1867	29,973 24
March 3.	Amount invested in $8,050 U. S. loan of 1865	8,965 68
" 23.	Amount invested in $7,750 U. S. loan of 1865	8,321 56
May 30.	Amount invested in $6,050 U. S. loan of 1865	6,881 87
June 27.	Amount invested in $8,100 U. S. loan of 1865	8,980 88
Aug. 9.	Amount invested in $363,000 U. S. loan of 1865–'66	399,749 38
1871.		
June 23.	Amount invested in $14,711.94 U. S. loan of 1881	16,348 74
1872.		
March 1.	Amount invested in $7,939.29 U. S. loan of 1881	8,643 90
Nov 4.	Amount invested in $1,408.61 U. S. loan of 1881	1,542 43
1873.		
Sept. 24.	Amount invested in $6,322.95 U. S. loan of 1865	7,096 88
	Total	$859,304 79

2d. Of the tract of Cherokee lands acquired under the said last-named treaty, and commonly called the "Cherokee Strip," being a tract embraced within the State of Kansas along its south margin, there were sold by the United States an amount somewhat in excess of 307,318.85 acres, the exact amount of which will be shown to the court.

The total gross proceeds of sale of said "strip" down to 21st March, 1883, is $437,336.65, and the net proceeds is the sum of $423,788.68.

The last-named aggregate of net proceeds has been invested by the United States and paid out for the benefit of the Cherokee Nation West, the Cherokee Nation East receiving no portion
26 thereof, as follows, and at the dates following, from which dates, respectively, petitioner is entitled to interest at the rate of six per centum per annum from the dates respectively of the said payments and investments, except where it shall appear that a different rate of interest on investments has been realized by the United States, in which cases petitioner is entitled to whatever interest has been realized from the investments respectively. The following are the said payments and investments:

1873.		
Sept. 24.	Amount invested in U. S. loan of 1865 for Cherokee Asylum, per act Feb'y 14, 1873	$26,796 87
Oct. 27. 28. 29.	Amount invested in U. S. loan of 1865 for Cherokee Asylum, per act of Feb'y 14, 1873	48,203 13
Dec.	Amount invested in U. S. loan of 1865, 5.20	28,809 87
1874.		
Jan'y 20.	Amount used in payment of national warrants	4,428 11
Ap'l 27.	Amount remitted to J. B. Jones, Indian agent for Cherokee Asylum, per act Feb'y 14, 1873	25,000 00
July 1.	Amount remitted to J. B. Jones, Indian agt.	32,350 65
Oct. 20.	Amount remitted to G. W. Ingalls, Indian ag't	25,029 16
1875.		
Mar. 10.	Amount remitted to D. W. Bushyhead, treas.	1,325 50
" 19.	Amount remitted to G. W. Ingalls, Ind. ag't	8,064 77
1876.		
Oct. 18.	Treasurer Cherokee Nation	11,516 44
1877.		
Nov. 24.	" " "	2,021 38
1878.		
Feb'y 25.	" " "	8 84
Aug. 1.	" " "	1,781 57
1879.		
Jan'y 28.	" " "	9,191 28
27		
Ap'l 26.	T. R. Williams, amount of Cherokee warrant	$3,847 00
Aug 21.	Treasurer Cherokee Nation	4,863 41
Nov. 28.	" " "	24,735 44
1880.		
Jan'y 14.	William A. Phillips, agent	5,000 00
" 31.	Treasurer Cherokee Nation	16,087 77
Feb'y 12.	" " "	18,174 87
Aug't 16.	" " "	18,856 32
Sept. 22.	" " "	20,831 59
1881.		
Jan'y 17.	" " "	6,288 57
Mar. 2.	" " "	15,890 74
Sept. 2.	" " "	5,014 45
Nov. 23.	" " "	5,354 58
1882.		
Jan'y 31.	" " "	10,534 02
Feb'y 17.	" " "	6,606 12
July 27.	" " "	6,874 55

Sept. 12. 1883.	"	"	"	----------	6,510 53
Feb'y 7.	"	"	"	----------	6,388 88
Mch. 31.	"	"	"	----------	17,402 27
	Total			----------	$423,788 68

3d. Your petitioner further avers that the United States has made disposal of the lands belonging to the Cherokee Nation and named in the said treaty of December 29th, 1835, as a "perpetual outlet west," the aggregate quantity of 2,279,528.74 acres for the gross sum $1,570,531.28, the net proceeds of which were $1,570,531.28, and which were produced by sales as follows:

	No. of acres.	Gross proceeds.	Net proceeds.
Sales to the Osage	1,570,196.30	$1,099,137 41	$1,099,137 41
" " " Pawnees	230,014.04	161,009 82	161,009 82
" " " Ottoes & Mis.	29,113.20	61,315 85	61,315 85
" " " Poncas	101,894.31	48,389 60	48,389 60
" " " Nez Perces	90,710.89	43,078 60	43,078 60
" " " Delawares	157,600.00	157,600 00	157,600 00
Total	2,279,528.74	$1,570,531 28	$1,570,531 28

28 Your petitioner has been wholly deprived of petitioner's share in the said proceeds and every part thereof, and of all interest thereon, wrongfully and illegally. Petitioner is entitled to its *pro rata* share of the said proceeds of sale, and of all earnings and interest derived therefrom.

XII.

The above several sums were placed to the credit of the Cherokee Nation in lieu of investment by the United States, as follows:

1st. The investment of the said sum of $1,099,137.41 of sales made to the Osage Indians were made at the dates and in the amounts following:

October	4, 1873	$80,000 00
April	27, 1874	95,000 00
"	14, 1875	200,000 00
March	3, 1875	721,748 80
"	1, 1880	2,388 61--

Making said aggregate of $1,099,137.41. On the respective sums last aforesaid from the respective dates of investment aforesaid petitioner is entitled to its *pro rata* share of interest at the rates of the respective investments, which rates are not now known to your petitioner, but will be shown at the hearing.

2d. The investment of the said sum of $265,404.27 of sales made to the Pawnees, Ottoes, and Mis. and Nez Perces were at the dates and in the amounts, as follows:

June 30, 1880	$161,009	82
" " "	61,315	85
" " "	43,078	60—

Making said aggregate of $265,404.27. On the respective sums last aforesaid from the respective dates of investment aforesaid petitioner is entitled to its *pro rata* share of interest at the rates of the respective investments, which rates are not now known to your petitioner, but will be shown at the hearing.

3d. The investment of the said sum of $48,389.60 of sales made to the Poncas was made on the 15th of September, 1881, on which petitioner is entitled to its *pro rata* share of interest, as in the last preceding cases.

4th. The investment of the said sum of $157,600.00 of sales made to the Delawares was made on the 8th of April, 1867, on which petitioner is entitled to its *pro rata* share of interest, as in the last preceding cases.

XIII.

1st. Your petitioner further says that on the 8th day of April, 1867, the said Delaware Indians, in addition to their said payment of $157,600.00, as above named, paid the additional sum of $121,824.28, in consideration for a common *pro rata* interest agreed by the said Cherokee Nation to be allowed to the said Delawares in the annuities, lands, proceeds of sales of lands, and other property of the Cherokee Nation.

Petitioner avers that the said consideration yielded to the said Delawares by the said Cherokees for said payment of said $121,824.28 was a consideration belonging to the Eastern Cherokees *pro rata* and in common with the entire Cherokee Nation, and your petitioner is entitled to share equally *pro rata* with the residue of the nation in the said sum of $121,824.28, and is entitled to interest upon its *pro rata* share of the last-named sum from the time of said payment, on the 8th of April, 1867, at six per centum per annum.

2d. Petitionor further avers that on the 7th day of June, 1869, the Shawnee Indians purchased of the said Western Cherokees a *pro rata* interest in the funds of the said Cherokee Nation, as provided by the above-named treaty of 19th of July, 1866, for which the Shawnees paid to the Western Cherokees the sum of $144,726.62, and which sum was placed to the credit of the nation by the United States on the 7th of June, 1869.

This fund is in part held by the United States in trust for the Cherokees, and your petitioner is informed has in part been paid over to the Western Cherokees; the amounts respectively so disposed of or held petitioner cannot now fully state, but the sum, and the rate of interest to which petitioner is entitled, will be shown upon the hearing hereof.

This fund of $144,726.62 was paid for an interest in funds which belonged *pro rata* to the entire Cherokee Nation, including your petitioner, but your petitioner has received no part thereof, nor any interest thereon; the said entire fund and interest, so far as the same

has been appropriated and paid out, has been wrongfully and illegally paid to the Western Cherokees exclusively.

XIV.

1st. Petitioner further avers that there was also paid to the Cherokee Nation West, on the 30th of June, 1880, on account of lands in the said Cherokee outlet, in pursuance of the act of June 16, 1880 (21 Stats., 248), the further sum of $34,595.73, which last sum added to the above-named sum, $265,404 27, paid by the Pawnees, Ottoes, and Mis., and Nez Perces to the said Cherokee Nation West, makes the aggregate sum of $300,000, the amount appropriated by the said last-named act of Congress.

Your petitioner avers that this last-named sum of $34,595.73, and all interest thereon, belongs *pro rata* to your petitioner equally with the Cherokees West; but the whole thereof hath been wrongfully and illegally appropriated to said Western Cherokees to the exclusion of your petitioner.

31 Petitioner is entitled to a *pro rata* share of said sum last named and interest thereon from the 16th June, 1880, at six per centum per annum.

2d. Your petitioner further avers that by the act of Congress approved March 3, 1883, entitled "An act making appropriation for sundry civil expenses of the Government for the fiscal year ending June 30, 1884, and for other purposes," there was appropriated the further sum of $300,000, said act providing as follows:

"To be paid into the treasury of the Cherokee Nation out of the funds due under appraisement for Cherokee lands west of the Arkansas river, which sums shall be expended as the acts of the Cherokee legislature direct, this amount to be immediately available: Provided, that the Cherokee Nation, through its proper authorities, shall execute conveyances satisfactory to the Secretary of the Interior to the United States in trust only for the benefit of the Pawnees, Poncas, Nez Perces, Ottoes, and Missourias, and Osages, now occupying the said tract as they respectively occupy the same before the payment of said sum."

Petitioner further avers that the said last-named sum of $300,000 has been placed by the United States to the credit of the Cherokee Nation, and your petitioner is entitled to an equal *pro rata* share of the said last-named sum, and to interest thereon from the date of the said last-named act. No part of which your petitioner has received.

XV.

Petitioner further avers that there are other sums of money and other property which belonged to the entire Cherokee Nation, including your petitioner, *pro rata*, and which have been appropriated wrongfully and illegally to the Cherokees West, and to which sums and property petitioner is entitled *pro rata*, and to interest thereon,

32 which other sums and property your petitioner cannot now more particularly set forth. Petitioner will ask leave of the court as said other sums and other property shall hereafter be ascertained to set the same forth by way of amendment to this petition.

XVI.

Your petitioner further avers that the aggregate amounts which the United States have received for and by virtue of the sales and dispositions of lands belonging to the entire Cherokee Nation, and in which your petitioner is entitled to a *pro rata* share, exclusive of interest, are, as near as petitioner can now set forth, as follows:

Proceeds of sale of "Neutral lands"	$859,304 79
" " "Cherokee strip"	423,788 68
" " "Cherokee outlet"	1,570,531 28
Delaware interest purchase above named	121,824 28
Shawnee " " " "	144,726 62
Above-named appropriation of June 16, 1880, balance	34,595 73
Above-named appropriation of Mar. 3, 1883	300,000 00
Total	$3,554,771 38

Your petitioner further avers that, as above set forth, your petitioner is entitled to its *pro rata* share of the last-named sum, together with its share of all interests, earnings, proceeds, and avails thereof which have accrued or which may hereafter accrue thereon, no part of which petitioner has ever received.

XVII.

Petitioner further avers that your petitioner is likewise entitled to a like *pro rata* share of the proceeds of all and any future or dispositions of any part of the lands herein mentioned belonging to the entire Cherokee Nation.

33 XVIII.

Your petitioner further avers that there is now in the possession of the United States of the funds belonging to said entire Cherokee Nation, and stock, bonds, and other securities obtained for and as investments of said moneys belonging to the said entire Cherokee Nation, a large sum of money and investments thereof, which have not been paid out or disposed of by the United States, and which are held subject to the equities of petitioner herein set forth in trust for the Cherokee Nation. Petitioner cannot here state the exact amount of said moneys and investments thereof still remaining in the possession of the United States, but avers that it is sufficient, as petitioner is informed and believes, to satisfy the claim of your petitioner as herein set forth.

XIX.

And your petitioner further avers that no part of the said moneys to which your petitioner is entitled, as hereinbefore averred, has ever been paid to your petitioner, nor has any of the interest arising therefrom been paid to your petitioner, but all payments that have been made on account thereof, whether of principal or of interest, have been paid to the said Western Band of Cherokees to the exclusion of the said Eastern Band, the amount of petitioner's *pro*

rata share, exclusive of interest so paid, aggregating, as near as petitioner can now state, the sum of $626,441.35, being paid in the amounts following, that is to say:

One-seventh of the above, $3,554,771.38	$507,824 48
" " " " " named commutation fund, $214,000	30,571 43
One-seventh of the aggregate installments of interest on the said $214,000	88,045 44
Total	$626,441 35

To this to be added interest on the amounts and from the dates respectively, as herein above set forth.

Prayer.

Your petitioner, in view of all the premises herein above set forth, prays:

1st. That an account may be taken of all the moneys, investments of moneys, stocks, bonds, interest, and other property, exclusive of lands belonging to the Cherokee Nation (including your petitioner, under the direction of the court), whether the same has come into the possession of the United States or of the said Cherokee Indians west, or otherwise.

2d. That a like account may be taken of all moneys and property of the entire Cherokee Nation which have at any time come into the possession of the United States, or any officer or agent thereof, with the date of the receipt thereof.

3d. That a like account may be taken of all payments made to and receipts by the Cherokee Nation west of property, money, bonds, stock, scrip, or other thing of value belonging to the Cherokee Nation, together with the dates of the payments and receipts thereof.

4th. That a like account may be taken of the quantity and location of lands belonging to the entire Cherokee Nation which remain the property of such nation.

5th. That a like account may be taken of the amounts of money, stocks, bonds, and other investments still remaining in the possession of the United States, and belonging to the Cherokee Nation, or to either band or part thereof, including in such account a statement of all the investments made, in what invested, the rate and amount of interest realized, or to be realized, the sources from whence derived, and all other matters and things requisite to a full and final accounting and decree, as herein prayed.

6th. That a like account and testimony be taken and census ordered showing the number of individuals, Cherokees, belonging to the said Eastern and Western Bands of Cherokee Indians, respectively.

7th. That a decree may be rendered in this case in favor of your petitioner for such amount of all the moneys, annuities, land, and other property which is herein above specifically set forth and mentioned belonging to the entire Cherokee Nation as your petitioner

will be entitled to on a *pro rata* division of said property belonging to the entire Cherokee Nation as herein set forth, allowing to your your petitioner in such decree an amount of all said property which shall be proportioned to the aggregate of such property as ascertained by said accounting as the number of individuals, Cherokees, in said Eastern Band is to the number of individuals, Cherokees, in the entire Cherokee Nation.

8th. That in accordance with the provisions of the act of Congres above named authorizing the bringing of this suit the court shall, by its decree herein, determine what interest, legal or equitable, your petitioner, the Eastern Band of Cherokees, has in the above-named moneys, stocks, bonds, and other property held in trust by the United States, and also in such decree specifically defining the rights and interest of the said Eastern Band therein, and in any moneys hereafter to be derived from sources similar to those out of which the fund decreed to your petitioner arose; and likewise defining in such decree in what lands and other property now held by the Cherokee Nation, your petitioner is entitled to its *pro rata* share.

36 9th. And your petitioner further prays for all such further relief in all the premises set forth in the petition as may be authorized by justice and equity by the laws and treaties of the United States, and by the act of Congress under which this suit is brought.

N. J. SMITH,
Principal Chief of the Eastern Band of Cherokee Indians.

SHELLABARGER AND WILSON,
Attorneys for the Claimant, the Eastern Band of the Cherokee Indians.

Post office, Washington, D. C.

SAMUEL J. CRAWFORD,
J. H. GILLPATRICK,
Of Counsel.

Post office, Washington, D. C.

STATE OF NORTH CAROLINA, }
Jackson County, } *ss:*

The undersigned, N. J. Smith, on solemn oath, says that he is the lawful and acting principal chief of the Eastern Band of the Cherokee Indians; that he has carefully read the foregoing petition of the Eastern Band of the Cherokee Indians against the United States of America, and that he is fully acquainted with the contents of the said petition; and this affiant further says that the matters and things set forth in said petition are true, as he verily believes.

N. J. SMITH.

Sworn to and subscribed by N. J. Smith, known to be the principal chief of the Eastern Band of Cherokee Indians, before me, and in my presence, this 7th day of May, A. D. 1883.

37 In witness whereof I have hereunto set my hand and official seal the day and year last aforesaid.

[SEAL.] E. R. HAMPTON,
Notary Public, Jackson Co., N. C.

STATE OF NORTH CAROLINA, *Jackson County:*

I, J. W. Fisher, clerk of the superior court, do hereby certify that E. R. Hampton is a commissioned notary public for Jackson county.

In witness whereof I have hereunto set my hand and affixed the seal of office this 7th day of May, A. D. 1883.

[SEAL] J. W. FISHER,
Clerk of the Superior Court, Jackson County, N. C.

II. *Motion for Leave to Amend Petition, and Allowance of Same. May* 15, 1883.

The claimant, the Eastern Band of the Cherokee Indians, now comes and moves the court for leave to amend the petition in the above-entitled cause, by insertion in the title of the case in such petition the name of "The Cherokee Nation, commonly called the Cherokee Nation, West," as a defendant in the case.

SHELLABARGER AND WILSON,
Att'y for Claimant.

Allowed in open court May 15, 1883.
By the court.

38 III. *Traverse. Filed May* 25, 1883.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

THOMAS SIMONS,
Asst. Attorney General.

39 IV. *Answer of the Cherokee Nation to the petition of the Eastern Band of the Cherokee Nation therein so-called. Filed September* 1, 1883.

The Cherokee Nation, directed to be made a party defendant to the suit and action above entitled by virtue of the provisions of an act of Congress of the United States entitled, "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30th, 1883, and for prior years. * * *," approved March 3d, 1883 (the pendency of the petition aforesaid having been brought to the knowledge of the principal executive officer of said nation by the delivery to him at Tahlequah, the capital of the nation and seat of its government, of a copy of the same); now and at all times hereafter, saving and reserving unto itself all benefit

and advantage of exception, which can, or may, be had or taken to the many errors, uncertainties and other imperfections in the said plaintiff's said petition and bill of complaint, declaring the
40 purpose of its appearance, and the reason and extent of its submission of itself as a party, and of its submission of the matters in controversy herein to the jurisdiction and judgment of this honorable court, pursuant to the said act of March 3d, 1883, says:

That it appears from an inspection of the said petition that the controversy and matters of alleged difference therein set out and narrated concern the Cherokee Nation and its property, and that the persons and parties alleged to be those in interest claim to be the Eastern Band of the Cherokee Indians, as a part of the Cherokee Nation of Indians, and the said Cherokee Nation, and no other:

Wherefore, declaring the truth of its history, the said nation shows to the court that from time immemorial it has existed upon the territory now comprised within the limits of these United States as a distinct people forming an Indian Nation, and as such nation, having and exercising the right to declare war and make peace, to enter into treaties with other nations beyond the borders, and within its own borders to make and enforce laws for the regulation and protection of the property, life, and liberties of its people.

That upon and since the adoption of the Constitution of the United States its character as a "distinct nation, living under the government of its own laws, usages, and customs," has been continually asserted on its own part, and recognized by the treaty-making power of the United States, and continues to be so asserted and recognized; all its treaties and business have been between the Cherokee Nation as a political body controlling its affairs and the Government of the United States. It has had a written constitution and laws for over three-quarters of a century. Its powers are inherent, but have been continually recognized and dealt with, and have, so far as the United States is concerned, not been relinquished or abridged save by the specific stipulations of treaties.

41 That no question of the right of the nation to the exercise of self-government has ever been raised or admitted, said nation differing in this respect from the large number of Indian tribes, which, not possessing organized governments, have to some extent been under the discretionary management of the Indian Bureau.

That by the terms and intendments of the fifth article of the treaty between the United States and the Cherokee Nation, concluded at New Echota, on the 29th day of December, A. D. 1835, its right "to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them," was recognized and affirmed.

With all due respect, therefore, for this honorable court that its appearance here may not become a precedent for future proceedings, reasserting its sovereign right to enact all laws necessary to the dis-

posal of the property of the nation, and the rightful exclusive jurisdiction of its own courts to hear and determine all controversies between the nation as a body-politic and its citizens, and between citizens of the nation, provided only that such laws and proceedings be not inconsistent with the Constitution of the United States and the acts of Congress regulating trade and intercourse with the Indian tribes; and especially denying that it may of right be summoned by or upon the suggestion of its own people or by those claiming to be such, into the courts of the United States for the settlement of controversies, real or pretended, affecting its government, territory, or other of its property rights whatsoever. Nevertheless, considering the said act of March 3d, 1883, as the offer of the courts of the United States as a tribunal to which it may, upon its own consent, resort for the settlement of the claims and pretensions in
41½ this cause set up and asserted, it does so appear, and, standing upon the solemn treaties made and entered into between it and the United States, and demanding their observance and enforcement as the highest equity in this behalf, now answering, says:

I.

That is not true that the claimant named in the said petition as "The Eastern Band of Cherokee Indians" is a part of the Cherokee Nation of Indians, or that there exists at the present time any bands or separately organized portions of the Cherokee Nation, having any rights as against each other, or any relations to or with each other respecting unsettled business; and the said nation denies as well that any individual composing the claimant, or claimant band, are citizens of or a part of the Cherokee Nation.

II.

The defendant nation further says: That it is true, as alleged by the claimant, that at and before the adoption of the Constitution of the United States, the Cherokee Nation (this defendant) possessed and owned a large body of land whose boundaries were defined by the "Treaty of Hopewell" (7 Stats., 18) concluded between the United States of America and the Cherokee Nation on the 28th of November, 1785, and that the right and title thereto of the Cherokee Nation was recognized and admitted by the Government of the United States; and defendant further says, that by immemorial custom and usage the property of the nation, whether real or personal, is a common estate, subject to disposal only by the constituted authorities of the nation under the constitution and laws thereof; that the estate, lands, and country embraced by the said "Treaty of Hopewell" were such common property, and were not in whole or in part the property, lands, or estate of any member or members, individual, person or persons composing the said tribe or nation.

42 III.

The defendant admits, that by a subsequent treaty, such cessions of parts and tracts of the lands embraced in the above-named reser-

vation were made to the United States, and on the part of the United States such payments were made and agreed to be made to the said Cherokee Nation as the price and consideration for said cessions; that upon the conclusion of the treaty entered into on the 25th day of October, A. D. 1805 (7 Stats., 93), there was due, and ordered to be paid to the Cherokee Nation, a permanent annuity, amounting to the sum of ten thousand dollars.

IV.

That the said permanent annuity was from the year last aforesaid paid in whole to the Cherokee Nation, and continued to be so paid until the year A. D. 1818, when, in consequence of, and pursuant to certain agreements and treaty stipulations entered into between the Cherokee Nation and the United States (which stipulations and agreements will hereafter be more particularly and at large set out and referred to), the nation became divided into two parts, the one part continuing to reside upon the lands and reservation remaining to them eastward of the Mississippi river, the other part removing to a tract of land selected to the westward of the Mississippi, and situated upon the waters of the Arkansas and White rivers; and upon such division the said permanent annuity was also divided between the two parts of the nation in proportion to their estimated numbers, two-thirds being paid to the Cherokees east of the Mississippi, and one-third to the Cherokees west of that river, and that said division and proportionate payment continued until the proclamation of the treaty "concluded at New Echota, in the State of Georgia, on the 29th day of December, 1835 (7 Stats., 478),
43 between the United States and the chiefs, headmen, and people of the Cherokee tribe of Indians" (being that part only of the Cherokee Nation remaining east of the Mississippi), when and wherein the following, among other articles, was agreed upon and adopted:

"Article 11. The Cherokee Nation of Indians, believing it will be for the interest of their people to have all their funds and annuities under their own direction and future disposition, hereby agree to commute their permanent annuity of ten thousand dollars for the sum of two hundred and fourteen thousand dollars, the same to be invested by the President of the United States as a part of the general fund of the nation; and their present school fund, amounting to about fifty thousand dollars, shall constitute a part of the permanent school fund of the nation."

V.

This defendant says that it is true, as the claimant avers, that to effectuate the agreement contained in the said article the Congress of the United States did, by the act approved July 2d, 1836, appropriate the sum of $214,000, in satisfaction of the said eleventh article of the said treaty, and the defendant says that in virtue of the said treaty provision, and of the said appropriation thereunder made as last aforesaid, the said sum of $214,000 by the terms of the eleventh article became "a part of the general fund of the nation," and

has ever since constituted and now in part constitutes the said general fund of the Cherokee Nation; that by the tenth article of the same treaty the investment of the said sum of moneys, and of other sums of money therein specified, was directed to be made by the President of the United States "for the benefit of the whole Cherokee Nation who have removed or shall remove to the lands assigned by this treaty to the Cherokee Nation west of the Mississippi."

44 That the settlements made by the said treaty of New Echota relating to the ownership, custody, investment, and distribution of the said commutation funds, and of other national funds, remained in force and were the law of the United States and of the Cherokee Nation until the ratification of the treaty concluded between them July 19th, 1866 (14 Stats., 805), when and wherein the following was agreed to and remains in force:

"Article 23. All funds now due the nation, or that may hereafter accrue from the sale of their lands by the United States as hereinbefore provided for, shall be invested in United States registered stocks at their current value, and the interest on all said funds shall be paid semi-annually on the order of the Cherokee Nation, and shall be applied to the following purposes, to wit: Thirty-five per cent. shall be applied for the support of the common schools of the nation and educational purposes, fifteen per cent. for the orphan fund, and fifty per cent. for general purposes, including reasonable salaries of district officers."

VI.

The defendant, by reason of these premises, therefore denies that the said sum of $214,000, or any interest arising therefrom, belonged in whole or in part, or may be lawfully claimed by any band or bands of the Cherokee Nation, and particularly denies that the claimant is entitled to any share therein, but says that the said fund and funds are administered alone for the purposes for which they were created, and that all payments of interest therefrom have been made as contemplated by treaty and the laws made in aid thereof.

VII.

45 Further, answering the averment of the petition, that, by reason of the matters contained in the treaties and acts of Congress set out and referred to in its said petition, "the said Cherokee Nation became divided into two parts or bands," the defendant, the Cherokee Nation, says that it is true that the unity of its nation and people which, theretofore, and from time immemorial, existed, was, for the causes in part set out in the preamble of the treaty concluded July 8, 1817, for a time destroyed; and that from that time, and until the period of the treaty hereinbefore referred to, concluded at New Echota Dec'r 29, 1835, the nation was divided into bands, sometimes known as "the Cherokee Nation east of the Mississippi river," and "the Cherokees on the Arkansas river," but the defendant denies that the said division continued after the ratification of the treaty last aforesaid, and, on the contrary, avers that it was chief among the purposes and objects of the parties and all of them, to

the said treaty of New Echota to reunite the Cherokee Nation into one body-politic, and especially to put an end to the division consequent upon and following the agreements of the said treaty of July 8, 1817; that the purpose aforesaid was made effectual; that all of the lands of the nation to the eastward of the Mississippi river were sold to the United States, and their possession delivered up and abandoned for a money consideration of five millions of dollars, to be expended according to the express conditions of the treaty; that in further pursuance of the provisions of the said treaty of December 29, 1835, the Eastern Band removed to and together with those of their nation, theretofore known as the Western Band, established themselves upon the lands and within the boundaries of the country conceded by the treaty concluded at the city of Washington May 6, 1828, and afterwards assured by the patent of the United States bearing test the first day of December, 1838, now known as "the Cherokee Nation in the Indian Territory," and they say
46 that never since the proclamation of the said treaty of December 29, 1835, and the removal of the Eastern Band or portion of the Cherokee Nation in compliance with its terms, has there been or asserted to the eastward of the Mississippi river any reservation, land, or country owned or claimed by them (save and except certain school lands in the State of Alabama, which have been sold from time to time as provided for by law and treaty, the proceeds being added to the Cherokee national school fund), nor has there been since the date last aforesaid, to the eastward of the Mississippi river, or elsewhere beyond the limits of the Cherokee Nation, in the Indian Territory, any band of the Cherokee Nation recognized as such by them, or entitled to such recognition under their laws.

VIII.

Replying to the further averment of the claimant that it has been and is fully recognized by the Executive and Legislative Departments and by the treaty-making power of the Government of the United States, "as members of the Cherokee Nation and as a separate and distinct band of such nation," the defendant admits, as in said petition set out, that the Congress of the United States did, by the act approved July 27, 1868 (15 Stats., 228), in its second section, direct the Secretary of the Interior to cause a new roll or census of the "North Carolina or Eastern Cherokees," to be made, "which shall be the roll upon which payments due the said Indians shall be made;" and that by the third section of the same act the Secretary of the Interior was directed to cause the Commissioner of Indian Affairs to take the same supervisory charge of "the Eastern or North Carolina tribe of Cherokees as of other tribes of Indians;" but the defendant expressly denies that the said "North Carolina or Eastern Cherokee" (if such band there be) are a band of the Cherokee Nation, or are or ever were a part of the body-
47 politic known and existing as the Cherokee Nation; and denies that any roll or payment mentioned in the said second section has reference to, embraced, or was intended to dispose of, any fund or funds acquired or to be acquired by the defendant, or any

or either of the funds referred to in the said act of Congress of March 3, 1883, under which this suit is brought; but, on the contrary, it says that the roll so to be made was for the sole purpose of evidencing the share of personal benefits claimed yet to be due under the said treaty of 1835, which said personal benefits, as clearly defined by law and treaty, include "removal and subsistence money," the several and individual right to which has never been questioned, but on the contrary is admitted as well in favor of such as remained under the provisions in that regard of the treaty of New Echota as of those who removed; that the sums so arising have been received and receipted for by those persons entitled thereto, and that no other claims or rights whatever belong to or may be lawfully claimed by the plaintiff; and as to the section of said act authorizing the Commissioner to exercise supervisory control as aforesaid, the defendant denies that said act did, or that it is within the province of Congress to create Indian tribes, and it especially declares that there is no power anywhere lodged (save in the defendant nation) by which any individual, party, tribe, or band can be given an interest in the property of the nation, or be made a part of its body-politic for any purpose whatever.

IX.

And further answering on that behalf, the defendant says, true it is that there are in the State of North Carolina and elsewhere scattered individual persons of their race and kindred, composed in part of the survivors of those who accepted the conditions of the first clause of the twelfth article of the aforesaid treaty concluded
48 at New Echota, December 29, 1835, and of their descendants, and of such other persons as have voluntarily abandoned their citizenship in the said nation. The clause of the said 12th article last above referred to is as follows:

"Article 12. Those individuals and families of the Cherokee Nation that are averse to a removal to the Cherokee country west of the Mississippi and are desirous to become citizens of the States where they reside and such as are qualified to take care of themselves and their property shall be entitled to receive their due portion of all the personal benefits accruing under this treaty for their claims, improvements, and *per capita* as soon as an appropriation is made for this treaty."

And defendant avers that so far as the claimant is or may be composed of individuals and families once of the Cherokee nation, that they are those individuals and families (and their descendants) described in the said 12th article; that they and every one of them were and are bound by the said 12th article, and by all the provisions of the said treaty of New Echota; that they have received, receipted for, and duly acquitted the United States and all concerned for the personal benefits *per capita*, and other claims whatever due and to become due to them under said treaty. And, further answering in that regard, the defendant, upon information and belief, declares the truth to be that the claimant is not now, and was not

at the date of the commencement of this action, nor on the day of the passage of the said act of March 3d, 1883, a tribe or band composed of persons owing or acknowledging allegiance to any authority other than the State within which they reside, and that they, and every one of them, pursuant to the desire expressed in the said 12th article, have become and are citizens of the State of their residence, to wit, of the State of North Carolina.

That by the constitution of the Cherokee nation it is pro-
49 vided: "That whenever any citizen shall remove with his effects out of the limits of this nation and become a citizen of any other government all his rights and privileges as a citizen of this nation shall cease."

Wherefore, referring again to the 10th article of the treaty, concluded at New Echota, which, upon the consent and contract of the Cherokee tribe and Nation, and particularly upon the consent and stipulations of the Cherokee Nation east of the Mississippi river, set apart their annuities commuted to the sum of $214,000, "for the benefit of the whole Cherokee Nation, who have removed or shall remove to the lands assigned by this treaty, to the Cherokee Nation west of the Mississippi river," and averring that neither the complainant as a band nor any of the individuals composing it did or have so removed west of the Mississippi, the defendant denies that the claimant may lawfully demand, or ought in conscience to claim or recover, any portion of the said sum.

X.

And for answer to all that part of the petition herein, setting forth the further claim additional to that for annuity and interest thereon—that is to say, claiming an interest and share in the proceeds arising out of the sale of lands lying west of the Mississippi river—the defendant says it is true that up to the ratification of the treaty concluded July 8th, 1817, the lands of the Cherokee Nation were in one body, lying to the eastward of the Mississippi, and, though diminished in their extent and area, by the quantity ceded from time to time to the United States, were within the boundaries prescribed by said "treaty of Hopewell;" and that to all of the said remaining lands the Cherokee Nation held therein an absolute title, subject only to the pre-emption right of purchase, acquired by the United States as successor of Great Britain; that said title was, according to the immemorial custom and usage of the Cherokee Nation,
50 continued and in force among them to this day, a title in common, and not in severalty, and vested in the Cherokee Nation as a body-politic, and not in any individual separate band, or division whatever, of the said nation.

XI.

That upon the conclusion of the treaty last aforesaid, in consideration of the fact that a portion of the Cherokee people had migrated to lands of the United States beyond the Mississippi, and fixed their habitation there upon the waters of the Arkansas and White rivers, and of the known and expressed purpose of others of the nation to

follow, it was, by the act of the Cherokee Nation, as expressed in said treaty, agreed that certain of their lands, estimated to be proportionate to the number of their people who had emigrated, and were about to emigrate, should be ceded to the United States, and in part satisfaction of the said estimated quantity, certain lands were, by the first and second section of the said treaty (7 Stats., 157) so conveyed.

XII.

That the United States bound themselves in exchange therefor, and by the 5th article of the said treaty conveyed and "give to that part of the Cherokee Nation on the Arkansas as much land on said river and White river as they have or may hereafter receive from the Cherokee Nation east of the Mississippi, acre for acre, as the just proportion due that part of the nation on the Arkansas agreeable to their numbers; and by a further provision of said article the tract so conveyed and exchanged was severed and designated by its specified metes and bounds, and became the property in common of "the Cherokees on the Arkansas river."

51 XIII.

That afterwards, to wit, on the 27th day of February, 1819, there was concluded at the city of Washington between the Cherokee Nation and the United States (7 Stats., 195) a further treaty, whereby in adjustment and final settlement and satisfaction for the grant of land aforesaid on the Arkansas and White rivers, made to that part of their nation which had emigrated or might thereafter "emigrate to the Arkansas," the Cherokee Nation, by the terms of the first article thereof, ceded to the United States certain other of its lands therein described.

XIV.

And, further answering, the defendant says that the said land upon the Arkansas river being and remaining the lands and the property of "the Cherokees on the Arkansas river," and not the property of the "Cherokee Nation," for the certain causes and considerations expressed in the preamble thereto, the United States and the said "Cherokees on the Arkansas river," under the name and designation of "the Cherokee Indians west of the Mississippi river," at the city of Washington, on the 6th day of May, 1828, concluded a treaty (7 Stats., 311) whereby the United States on its part agreed to possess the Cherokee Indians west with seven millions of acres of land located upon the waters of the Arkansas, Canadian, and Grand or Neosho rivers, but to the westward of the lands conveyed to them by the said treaty of July 8, 1817, and lying within what is known as the "Indian Territory," and comprising the lands now constituting the country of the Cherokee Nation, and for and in consideration of the said stipulation and conveyance to them, the said "Cherokee Nation of Indians west of the Mississippi" gave up and surrendered to the United States, and agreed to leave
52 the same within fourteen months, of all the lands to which they were entitled in Arkansas, and which were secured to

them by the aforesaid treaty of January 8th, 1817, and the treaty and convention of February 27th, 1819, and thereupon the said Cherokee Nation west of the Mississippi did give up and remove from the lands last aforesaid and took up their residence upon and became the owners of the said seven millions of acres in the said treaty of May 6th, 1828, and in the second section thereof conveyed and described.

By "articles of agreement and convention" made and concluded at Fort Gibson, on Arkansas river, February 14th, 1833 (7 Stats., 414), between the United States on the one hand and "the Cherokee Nation of Indians west of the Mississippi" on the other, and which was, by the 5th article thereof, declared to be supplementary to the said treaty of May 28th, 1828, the boundaries of the quantity of seven millions of acres of land ceded to the Cherokee Nation of Indians west, as described in the second section of the said treaty, were amended and reformed so that, upon the proclamation of that said treaty, the boundaries and estate of the "Cherokee Nation of Indians west of the Mississippi" became vested and fixed, according to the stipulations of the 1st article thereof, which is as follows:

"Article 1. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby pledged, of seven millions of acres of land, to be bounded as follows, viz: Beginning at a point on the old western territory line of Arkansas Territory, being twenty-five miles north from the point where the territorial line crosses Arkansas river; thence running from said north point south on the said territorial line to the place where said territorial line crosses the Verdigris river; thence down said Verdigris river to the Arkansas river; thence down said Arkansas to a point where a stone is placed opposite to the east or lower bank
53 of Grand river at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a straight line to a point four miles northerly from the mouth of the North Fork of the Canadian; thence along the said four miles line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river, and running thence with the western line of Arkansas Territory as now defined to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand river; thence up said Grand river as far as the south line of the Osage reservation, extended if necessary; thence up and between said south Osage line, extended west, if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line will make seven millions of acress within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded the United States further guarantee to the Cherokee Nation a perpetual outlet west and a free and unmolested use of all the country lying west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend: Pro-

vided, however, That if the saline or salt plain on the great western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees, and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed." (7 Stats., 415.)

54 And because of the matters aforesaid, of the treaties, stipulations, and considerations thereto moving the parties, the defendant insists that the property assured by the said 1st article, and ordered to be conveyed by letters patent, was to "the Cherokee Nation of Indians west of the Mississippi river," and not to "the Cherokees," as is claimed by the plaintiff; and the defendant says, that the said nation west of the Mississippi, pursuant to the said treaty, thereupon took, had, and held the said tract and lands in full and undisputed ownership and possession.

XV.

This defendant now says and avers that the only right that "the Cherokee Nation East," or any individual thereof, had in the lands west (that is to say, in those said lands purchased for "the Cherokees of the Arkansas river," by the stipulations of the said treaty of May 6th, 1828, 7 Stats., 311) was the privilege freely and graciously accorded of removing to and settling upon said lands, as is set out and appears from the preamble and 8th article of the treaty last aforesaid; but this defendant denies that these claimants ever did remove to or settle upon said lands, but, on the contrary, it avers that they declined, and still persistently do decline, to so remove, or to become citizens of the reunited nation; that they have never borne any share in its burdens and responsibilities, nor contributed to the enhancement of the value of the national estate; that by remaining beyond the boundaries of the Cherokee Nation they have pursued a course of conduct which, if also pursued by this defendant, would by the terms of the patent aforesaid have forfeited the whole estate to the United States; wherefore, the defendant now says that their demand for a division of the said estate, and its apportionment to them in part, equally with these defendants who, accepting the provisions of said treaty, underwent the hardship of removal, and

55 have, by remaining on the lands of the nation during the past fifty years, brought the common estate up to its present value, is against all conscience, and should be denied.

XVI.

And further setting forth the fact, and declaring the condition and lodgment of the title of the said seven millions of acres of land, and of the perpetual outlet west, and of the free and unmolested use of all the country lying west of the western boundary of said seven millions of acres as described and conditioned in Article 1, last aforesaid, the defendant says, that by the treaty concluded at New Echota, in the State of Georgia (hereinbefore referred to), on the 29th day of December, 1835, between the United States, by commissioners having "authority to conclude a treaty with the Cherokees east" (7 Stats.,

479), and the Cherokee Nation "east of the Mississippi," said tribe and nation, by the 1st article of said treaty, relinquished and conveyed (for a specified consideration) to the United States "all the lands owned, claimed, or possessed by them east of the Mississippi river;" and by the second article of the said treaty referring to the provisions of the treaty of May 6th, 1828, and the further treaty of February 14th, 1833, made with the "Cherokee Nation of Indians west of the Mississippi," and reciting and quoting the first section of the treaty last named, as the same is in this answer fully set out, thereupon further stipulated and provided that "on account of apprehension by the Cherokees that in that cession there was not contained" a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, "in consideration of the sum of five hundred thousand dollars, therefore hereby covenant and agree to convey to the said Indians and their descendants, by patent, in fee simple" an additional tract of land, therein particularly described, estimated to contain eight
56 hundred thousand acres of land, and by Article 3 of the same treaty it was stipulated that:

"Article III. The United States also agrees that the land above ceded by the treaty of February 14, 1833, including the outlet, and those ceded by this treaty shall all be included in one patent executed to the Cherokee Nation of Indian by the President of the United States according to the provisions of the act of May 28, 1830."

The defendant says that the parties to the said treaty were as aforesaid the United States of America and "the Cherokee Nation of Indians east of the Mississippi river," and no others; that upon the conclusion of the said treaty the title to the lands embraced by the said 1st article of the said treaty of February 14th, 1883, remained vested and conditioned as therein provided—that is to say, remained the property of the Cherokee Nation of Indians west of the Mississippi river, and that, as to the said additional tract of eight hundred thousand acres of land, the consideration therefor was the sum of five hundred thousand dollars provided to be paid out of the money arising from the sale of the lands remaining to the Cherokee Nation east of the Mississippi river (according to the terms and conditions of said treaty of New Echota).

XVII.

And for further answer the defendant says that the primary object of the treaty last aforesaid was to procure the emigration of the Cherokees east to the country conceded to their western brethren, and to effect a reunion of the nation; that among other things expressly stipulated and agreed to by the Cherokees—that is to say, by the Cherokees east of the Mississippi—in the treaty of New Echota was "that they shall remove to their new homes" (meaning the Cherokee country in the Indian Nation) "within
57 two years from the ratification of this treaty." (This being a part of, and a condition of, said payment of five millions of dollars for the lands owned by the Cherokee Nation east).

And, repeating the averment hereinbefore made that the said "Eastern Band of Cherokee Indians" did, according to their agreement in that behalf, remove to their new home (except a few who elected to remain and accepted the provisions of the 12th article of said treaty), the defendant further says that the nation, being so reunited in the west, for the purpose of witnessing and making the same effectual, met in national convention at Illinois camp grounds, within the borders of their said new home, and, on the 12th day of July, 1838, then and there adopted and published the following "Act of Union":

"*Act of Union Between the Eastern and Western Cherokees.*

"Whereas our fathers have existed as a separate and distinct nation' in the possession and exercise of the essential and appropriate attributes of sovereignty, from a period extending into antiquity, beyond the records and memory of man; and whereas these attributes, with the rights and franchises which they involve, remain still in full force and virtue, as do also the national and social relation of the Cherokee people to each other and to the body politic, excepting in those particulars which have grown out of the provisions of the treaties of 1817 and 1819 between the United States and the Cherokee Nation, under which a portion of our people removed to this country and became a separate community (but the force of circumstances have recently compelled the body of the Eastern Cherokees to remove to this country, thus bringing together again the two branches of the ancient Cherokee family), it has become essential to the general welfare that a union should be formed and a system of government matured adapted to their present condition, and
58 providing equally for the protection of each individual in the enjoyment of all his rights.

"Therefore we, the people composing the Eastern and Western Cherokee Nation in national convention assembled, by virtue of our original unalienable rights, do hereby solemnly and mutually agree to form ourselves into one body politic, under the style and title of the Cherokee Nation.

"In view of the union now formed, and for the purpose of making satisfactory adjustment of all unsettled business which may have arisen before the consummation of this union, we agree that such business shall be settled according to the provisions of the respective laws under which it originated, and the courts of the Cherokee Nation shall be governed in their decisions accordingly. Also, that the delegation authorized by the Eastern Cherokees to make arrangements with Major General Scott for their removal to this country shall continue in charge of that business, with their present powers, until it shall be finally closed; and also, that all rights and titles to public Cherokee lands on the east or west of the River Mississippi, with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers or derived from any other source, shall henceforward vest entire and unimpaired in the Cherokee Nation as constituted by this union.

"Given under our hands, at Illinois camp grounds, this twelfth day of July, 1838.

"By order of the national convention.

"GEORGE LOWERY,
"*President of the Eastern Cherokees.*
his
"GEORGE x GUESS,
mark.
"*President of the Western Cherokees.*"

And the defendant says that the said act of union then and
59 there was, and ever since has been, recognized as of binding force; that it is preserved in the public archives of the nation, and is duly published in the body of their laws; that the said union having become effectual soon thereafter, to wit, on the sixth day of September, 1839, there was framed and adopted at Tahlequah, Cherokee Nation, a constitution for the reunited nation, the preamble and first article of which are in the following words:

Constitution.

"The Eastern and Western Cherokees having again reunited and become one body-politic, under the style and title of the Cherokee Nation: Therefore—

"We, the people of the Cherokee Nation, in national convention assembled, in order to establish justice, insure tranquility, promote the common welfare, and to secure to ourselves and our posterity the blessings of freedom—acknowledging with humility and gratitude the goodness of the Sovereign Ruler of the Universe in permitting us so to do, and imploring His aid and guidance in its accomplishment—do ordain and establish this constitution for the government of the Cherokee Nation.

"*Article I.*

"SEC. 1. The boundary of the Cherokee Nation shall be that described in the treaty of 1833 between the United States and the Western Cherokees, subject to such extension as may be made in the adjustment of the unfinished business with the United States.

"SEC. 2. The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made or may be rightfully be in possession of them: Provided, That the citizens
60 of the nation possessing exclusive and indefeasible right to their improvements, as expressed in this article, shall possess no right or power to dispose of their improvements in any manner whatever to the United States, individual States, or to individual citizens thereof; and that whenever any citizen shall remove with his effects out of the limit of this nation and become a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease: Provided, nevertheless, That the National Council shall have power to readmit by law to all the rights of citi-

zenship any such person or persons who may at any time desire to return to the nation on memorializing the National Council for such readmission.

"Moreover, the National Council shall have power to adopt such laws and regulations as its wisdom may deem expedient and proper, to prevent citizens from monopolizing improvements, with the view of speculation." (Compiled Laws of the Cherokee Nation, pp. 7–11.)

XVIII.

This defendant further says that after the reunion of the whole Cherokee people into one body-politic under the style and title of the "Cherokee Nation" as aforesaid, serious difficulties arose between the different portions of the people constituting and recognized as the Cherokee Nation of Indians; that for their final settlement a treatment was entered into at Washington, in the District of Columbia, on the 8th day of August, 1846 (9 Stats., 871), between the United States on the one part and by commissioners appointed by the regularly constituted authorites of the Cherokee Nation, and by delegations representing the other, and all of the other parties and portions of the Cherokee Nation of Indians on the other part, whereby it was agreed as follows:

61 "*Article I.*

"That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west, promised by the United States in conformity with the provisions relating thereto contained in the 3d article of the treaty of 1835, and in the 3d section of the act of Congress approved May twenty-eighth, 1830, which authorizes the President of the United States, in making exchanges of land with the Indian tribes, to assure the tribe or nation with which the exchange is made that the United States will forever secure and guarantee to them and their heirs or successors the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided always, That such lands shall revert to the United States if the Indians become extinct or abandon the same."

And by virtue of this article and of other stipulations in the said treaty contained the defendant avers that all claims and pretensions to any separate ownership or interest by or on behalf of any band, party, or tribe of the Cherokee Nation in or to the lands aforesaid ceased and were withdrawn, and the said lands became the property in common of the Cherokee Nation. The exclusive claim of the Western Cherokees being relinquished, the domain which had already been conveyed to "the Cherokee Nation" by the patent, dated December 1, 1838, remained the common property in fee-simple of the Cherokee Nation thus reunited; and thereupon all and every party or division of the Cherokee Nation ever recognized as claim-

ing or having a share in the national estate, being there present and joining in said treaty, they and all of them, together with the United States, agreed and covenanted with each other that all party
62 distinctions should thenceforward and forever cease, save in so far as to execute said treaty.

XIX.

Defendant, further answering, says it is true that by the 15th, 16th, and 17th articles of the treaty concluded July 19th, 1866, provision was made for the disposal of certain of its lands, upon the contingencies specially provided for; but it says that an inspection of the said treaty will show that the sole ownership of the lands so to be disposed of was conceded to be in this defendant, and that for such as were or might be sold payment was to be made to it.

Further answering, the defendant says that it is true that by virtue of the said articles 15, 16, and 17 lands have been sold and disposed of, and among others the said tract, estimated to contain eight hundred thousand acres of land, and declares that the net proceeds were, and remain, invested in strict conformity to the stipulations of the 23d article of said treaty; that is to say, for the benefit of the "Cherokee Nation," and not, as alleged by the claimant, for the benefit of the "Cherokee Nation West."

That, of a tract of land embraced among others by the said patent, commonly called the "Cherokee strip," within and lying along the south boundary of the State of Kansas, a large amount has been sold, but the defendant denies that the net proceeds have been invested by the United States, and paid out for the "Cherokee Nation West;" and further denies that the "Cherokee Nation East" received any portion thereof, but says that in conformity with the said 2d article the said fund was invested, and, so far as it has in anywise been disbursed, was invested and paid out without discrimination whatever, for the benefit of the Cherokee Nation, the said nation comprising, as heretofore set out and shown, both the Cherokee Nation East and the Cherokee Nation West.

63 The defendant admits that sales have been made of portions of that part of their country west of the 96th° of longitude, comprised in what is described in said treaty of December 29th, 1835, as "a perpetual outlet west," but denies that the petitioner was entitled to a *pro rata* or other share therein; and, as to the several amounts, dates, and statements of sales, gross proceeds, net proceeds, and investments, particularly set out in the eleventh and twelfth paragraphs of claimant's petition, defendant at this time neither admits nor denies the same, not being possessed of sufficient data to verify the statements as made, but avers that all investments, disbursements, and expenditures have been made under and in conformity with law and treaty, by authority of, and for the benefit of, the people of the Cherokee Nation.

XX.

Answering the claim of the petitioner as set up in the thirteenth paragraph of its petition, that because of certain alleged payments

67 V. *Replication of the Claimant. Filed Nov.* 16, 1883.

The above-named claimant, The Eastern Band of Cherokee Indians, now comes and makes reply to the answer of the above-named defendant, the Cherokee Nation, commonly called the Cherokee Nation West, and saving and reserving to itself all, and all manner of advantage of exception to the manifest insufficiencies of the answer of the said Cherokee Nation, commonly called the Cherokee Nation West, and says that it avers and will prove that the averments and statements of its said petition are true, certain, and sufficient; and the said claimant denies all the averments in the said answer contained which are inconsistent with the averments of the said petition; and the claimant denies all and singular all the averments of the said answer which traverse, deny, or are inconsistent with the said averments in the said petition contained.

SHELLABARGER AND WILSON,
Attorneys for the Claimant.

68 VI. *Findings of Fact Filed by the Court June* 1, 1885, *and Conclusion of Law and in Equity thereon.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The claimant's organization and constitution are shown by the following proceedings from their records:

CHEOAH, *December* 10, 1868.

In general council assembled of the Eastern Cherokees, being desirous of holding our general councils in some organized and established manner and under a like form as other tribes of Indians who are desirous of adopting a republican form of government and restricting, controlling, and compensating our rules, do hereby enact as follows:

That hereafter each Cherokee settlement or town shall be entitled to one delegate for each —— members of such settlement, who shall represent them in general council, and that said general council shall meet once in each year on —— of ——; that said general council shall, from their number, when convened, elect one of their number, who shall be chairman or president of said council, and who shall be president or chief of said Eastern Cherokees for the term of time so directed by said council, not exceeding four years, and in case of choice each settlement may petition said council in writing upon any subject. Said council shall have power to elect a secretary and interpreter of the council and marshal of the nation, and fix the duties, compensation of the same.

Said council shall have the power to prepare and adopt by-laws and rules for general government of the people and the duties of each national officer, and also the compensation of said council, and assess the national funds and property to pay the same.

Said council may prepare by-laws and police regulations and other

rules, and submit the same to the nation in general council assembled, and a majority vote shall adopt or reject the same. They shall also prepare a system of schools in each settlement and provide for the election of a superintendent or board of trustees, who shall organize the same in accordance with said regulations.

Said council may, in their discretion, fix a place and day or days for holding a national fair where each person may present samples of grain, stock, weaving, knitting, spinning, needlework, butter, and any article of agricultural product or fruit and domestic or mechanical product, and also a measured proven amount of crop per acre, and the numbers of acres cultivated in any crop, and fix committees to grant premiums thereon and name the same, and one premium for the best general system of farming to be shown by general statement.

JOHN WAYNOMA, *Chairman.*

Attest: N. J. SMITH,
Clerk of Committee and Council.

DECEMBER 1, 1870.

The council met pursuant to adjournment and proceeded to business.

The election of principal and second chief was then opened and held, and resulted in the election of Flying Squirrel or Callee-high as principal chief, and John Jackson Oo-wah-tun-tee as second chief.

The following form of government was referred to the committee and report favorable.

69 It was then moved and seconded that the constitution be adopted by the council, which was unanimously adopted as follows:

1st. Whereas the legal representative or councilmen of the different towns or settlements of the Eastern Band of the Cherokee Indians have this day and date at the place aforementioned met according to general agreement and understanding.

2d. Said council be, and is hereby, duly authorized and empowered by representation, as the undersigned showeth, to provide for the common interest and enact measures by which the aforesaid band of Indians may be represented in prosecuting and defending all matters pertaining to or touching the interest of said band of Indians with the United States Government or State or States, or individuals of the United States, in whatever relation said interest may be: Provided, That nothing herein be so construed as an abrogation of any rights, claim, or claims of any individual or individuals of said band to the legislation of said council as common property.

3d. All members constituting the aforesaid council shall be, and they are hereby, governed and bound by all acts passed in council of delegates and approved by the chief.

4th. All acts done, made, and confirmed in grand council as aforestated shall be *an* effectual and binding upon all members belonging to or constituting the aforesaid band as a band in all matters

held in common or pertaining to the common interests of said band, and not otherwise.

5th. Provided further, That there be, and the council is hereby, authorized to appoint annual session for holding grand councils at such place and time as they may designate and determine on, and no called or appointed counsel otherwise held shall be held valid or binding upon the aforesaid band or the subjects thereof, unless the chief, in his judgment and reason, thinks the interest of said band demands or justifies such called or appointed council.

Also that there be ordered a stated election to be held in each town or settlement for the purpose of electing first and second chief, whose power and right of governing shall extend over the whole band of Eastern Cherokees for and not exceeding the term of two years. Also for the electing all subaltern officers to legally constitute the aforesaid annual council. The said subordinate term of office shall not exceed one year, only by the annual election of the band. The right of vote by which said band shall be governed shall be exclusive and consist only of its male members of sixteen years of age and upwards. And the aforesaid officers so elected shall have the exclusive right to govern and rule, and all the acts done, made, or had by officers for the term elected shall be held binding and in full force upon said band. The aforesaid chiefs so elected shall have no power nor hold any right of jurisdiction to enact or enforce laws within themselves over the band of which he presides as chief, but in all cases or interests conflicting or touching the common right of said band the legal representatives shall be duly notified by the chief and the legislative body assembled.

Amendments to the Constitution of the Eastern Band of Cherokee Indians.

The Eastern Band of Cherokees having again reunited and become one body-politic under the style and title of the Eastern Band of Cherokees:

Therefore, we, the people of the Eastern Band of the Cherokee Indians in annual council assembled, in order to establish justice, insure tranquility, promote the common welfare, and, to assure to ourselves and our posterity the blessings of freedom, acknowledging with humility and gratitude the goodness of the Sovereign Ruler of Universe in permitting us so to do, and imploring His aid and guidance in its accomplishments, do ordain and establish these amendments to the constitution for the government of the Eastern Band of Cherokee Indians.

Article 2.

Section 1. The power of the Eastern Band of the Cherokee Indians shall be divided into two distinct departments, the executive and legislative; the executive to consist of the first and second chief and the legislative of the council.

Article 3.

Section 1. The legislative power shall be vested in a council, and

all enactments of the council shall be signed by the chairman of the council, approved by the principal chief; and in all their deliberations the vote shall be taken by yeas and nays, unless otherwise directed by the council.

Sec. 2. That each member of the annual council before he takes his seat to transact any business of the council shall take the following oath (or affirmation): I, A B, do solemnly swear (or affirm) that I have not obtained my selection or appointment as a member of this council by bribery or any undue or unlawful means or duress or fraud used by myself or others by my desire or approbation for that purpose; that I consider myself constitutionally qualified as a member of this council, and that on all questions and measures which may come before me, I will so give my vote and so conduct myself as in my judgment shall appear most conducive to the interest and prosperity of the Eastern Band of the Cherokee Indians, and that I will bear true faith and allegiance to the same, and to the utmost of my ability and power observe, conform to, and defend the constitution thereof.

Sec. 3. No person shall be eligible to any office or appointment of honor, profit, or trust, or seat in the council, who shall have aided or abetted, counseled or encouraged, any person or persons guilty of defrauding the Eastern Band of Cherokees, or who may hereafter aid or abet, counsel or encourage, any pretended agents or attorneys in defrauding the Eastern Band of Cherokees.

Sec. 4. The annual council to make all rules and regulations which they shall deem necessary and proper for the good of the band which shall not be contrary to this constitution.

Sec. 5. It shall be the duty of the annual council to pass such rules and regulations as may be necessary and proper to decide differences, by arbitration, to be appointed by the parties who may choose that summary mode of settlement.

Article 4.

Section 1. The supreme executive power of this band shall be vested in a principal chief, who shall be styled Principal Chief of the Eastern Band of the Cherokee Indians.

The principal chief shall hold his office for four years, and shall be elected by the male members of the Eastern Band of the Cherokee Indians of sixteen years of age and upwards.

Sec. 2. No person shall be eligible to the office of principal chief, except he be of the Cherokee Indian blood, and a member of the Eastern Band of the Cherokee Indians; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, nor shall any person be eligible to a seat in the annual council of the Eastern Band, except he be of Cherokee Indian blood and a member of the Eastern Band of the Cherokee Indians.

Sec. 3. The annual council may, in case of removal, death, resignation, or disability of both the principal and assistant principal chief, and declaring what officer shall then act as principal chief until their disabilities be removed or a principal chief be elected.

Sec. 4. The principal chief and assistant principal chief shall, at stated times, receive for their services a compensation which shall neither be increased nor diminished during the period for which they shall have been elected.

Sec. 5. Before the principal chief enters upon the executive duties of his office he shall take the following oath or affirmation: I, ——— ———, do solemnly swear (or affirm) that I will faithfully execute the duties of principal chief of the Eastern Band of the Cherokees, and will, to the best of my ability, preserve, protect, and defend the constitution of the Eastern Band of Cherokee Indians.

Sec. 6. He may, on extraordinary occasions, convene the council at such place as the annual council may designate as the seat of government.

Sec. 7. He shall, from time to time, give to the annual council information as to the state of affairs of the Eastern Band, and recommend to their consideration such measures as he may think expedient.

Sec. 8. He shall take care that the rules and regulations of the council are faithfully executed.

Sec. 9. It shall be his duty to visit the different towns and settlements at least once in two years

Sec. 10. Members of the annual council, executive, and all officers shall be bound by oath to support the constitution of the band.

Sec. 11. The members of the annual council shall be chosen for the term of two years.

Sec. 12. The treasurer of the Eastern Band shall be chosen by the annual council for a term of four years; the treasurer shall, before entering upon the duties of his office, give bond to the band, with sureties, to the satisfaction of the annual council for the faithful discharge of his trust.

Sec. 13. No moneys shall be drawn from the treasury but by warrant from the principal chief and in consequence of appropriations made by the council.

Sec. 14. It shall be the duty of the treasurer to receive all public moneys and to make a regular statement and account of the receipts and expenditures of all public moneys at the session of the annual council

71 *Article 5.*

Section 1. No person who denies the being of a God or a future state of reward and punishment shall hold any office in the civil department of the Eastern Band of Cherokee Indians.

Sec. 2. The free exercise of religious worship and serving God, without distinction, shall forever be enjoyed within the limits of the Eastern Band, provided that this liberty of conscience shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the Eastern Band of the Cherokees.

Sec. 3. When the annual council shall determine the expediency of appointing a delegation for the purpose of transacting business with the Government of the United States the principal chief shall recommend and, by the advice and consent of the annual council,

appoint and commission said delegates accordingly on all matters of interest touching the rights of the Eastern Band which may require the attention of the United States Government. The principal chief shall keep up a friendly correspondence through the medium of its proper officers.

Sec. 4. The commissions shall be in the name and by the authority of the Eastern Band of the Cherokee Indians, and be sealed with the seal of the probate judge in the county wherein the council is held, signed by the chairman, attested by the clerk of the council, and approved by the principal chief.

Sec. 5. Religion, morality, and knowledge being necessary to good government, the preservation of liberty and happiness of mankind, schools and the means of education shall forever be encouraged and cherished by the Eastern Band of Cherokee Indians.

Sec. 6. The annual council may prepare such amendments as two-thirds of council may deem expedient, and such amendments shall not be passed until the meeting of the next annual council, and to the protection and preservation of this constitution we mutually pledge our lives, our fortunes, and our sacred honor.

Article 6.

Section 1. The council shall consist of two members from each town or settlement having a popu ation of 100 souls, and when a town or settlement shall exceed 200 souls it shall have an additional number: Provided, That when any town or settlement shall have less than 100 souls it shall be entitled to one member.

Sec. 2. All male Cherokees, or persons of Cherokee blood, and all pers ons who have intermarried with Cherokees or those of Cherokee blood who shall have attained the age of sixteen years, shall vote at all public elections.

Sec. 3. The annual grand council at its annual session shall appoint two suitable persons as judges, to hold all public elections at the various towns or settlements, and the certificate of such judge shall be evidence of his election or selection, provided that when no election is held or selection made in any town or settlement, any person or persons may represent such town or settlement by producing a certificate or authority from a majority of the souls of said town or settlement: Provided further, That the certificate or authority shall contain the name of the souls they represent; and further, that elections shall be held on the first Thursday in September for all officers and councilmen, as the constitution prescribes.

Sec. 4. There shall be an executive council, consisting of the principal chief, assistant chief, and three associates, who shall be nominated by the principal chief and confirmed by the council.

Sec. 5. The grand council shall be held after the present session, annually, to be convened on the first Monday in October, at such place as may be designated by the grand council, in case of emergency, by the principal chief.

Sec. 6. The grand council at its annual session shall be called together by the assistant chief and organized by the election of chairman and clerk, and in case of death, resignation, inability, or for

any other cause said second chief does not act, then any member of the executive council may organize the council.

Sec. 7. The officers of the grand council shall consist of a chairman, assistant chairman, first and second clerk, interpreter, marshal, messenger, and doorkeeper.

Sec. 8. The oaths of principal chief, councilmen, and clerks may be administered by any officer of the government of North Carolina or the United States Government authorized to administer oaths.

Sec. 9. No person who may be convicted of felony shall be eligible to any office or *or* appointment of honor, profit, or trust within the Eastern Band of Cherokee Indians.

Sec. 10. The grand council may by commission provide for the purchase of lands for the Eastern Band of the Cherokee Indians, provided that any commission provided for under this ordinance may be nominated by the principal chief and confirmed by the grand council: Provided further, That no act of commission shall be construed to interfere with or in any manner impair the rights of individual members of said band.

72 Sec. 11. The grand council shall, by appropriate legislation provide a public school system for the Eastern Band of the Cherokee Indians.

Sec. 12. The principal chief shall have the right of veto upon all acts or resolutions enacted by the annual or called council of the band: Provided, That the veto power shall not hold good over a two-thirds vote of the grand council.

Sec. 13. The style of the grand council of the Eastern Band of Cherokee Indians shall be—

Be it enacted by the grand council of the Eastern Band of Cherokees.

J. W. HILDERBRAND.
T. Z. P. ENOLA, *Chairman.*

Attest:
JOHN G. TATHAM,
Secretary of Council.
HENRY SMITH, *Interpreter.*

Approved: LOYD R. WELCH,
Principal Chief Eastern Band of Cherokee Indians.

Cheoah Council Ground, October 13, 1875.

The organization is composed of persons residing mostly in North Carolina, members and descendants of the members and subjects of the Cherokee Nation, who did not remove with their brethren to the Indian Territory west of the Mississippi river, but who remained east. The number of Indians who remained immediately after the general removal incident to the treaty of 1835–'36 (7 Stat. L., 478) was between 1,100 and 1,200, some of whom have since joined the nation west.

The latest census of the Indians residing east is shown by Finding VII.

The organization was effected at the suggestion of the agent of the United States, sent down to take the census of the Eastern Cherokees, required by the act of July 27, 1868, ch. 259 (15 Stat. L., 228), so that, as he informed them, they could transact business with the United States Government.

Exactly what organization or organizations existed previously to the foregoing does not appear. The Indians in North Carolina generally kept themselves together, separated from the whites, and to some extent and at some periods in bands, with a chief and headmen, holding councils or meetings occasionally for the purpose of sending delegates to Washington to look after their moneyed interests, and for the purpose of trying to prevail upon the people to live in peace and as orderly people, and for other purposes. But when and how the chief was chosen, or what was the authority of their councils or meetings, or when they were first held, or how, or how frequently they were held, does not appear. They are registered and have voted at elections in North Carolina and pay taxes on their real and personal property. The common lands of the band are held by the Commissioner of Indian Affairs in trust for the band, and are assessed, the unoccupied land against the chief for the band, and the occupied land against the persons who occupy them.

II.

All the *per capita* money mentioned in article 12 of the treaty of 1835–'36 (7 Stat. L., 478) and all the removal and subsistence money ($53.33 to each person) mentioned in article 8 have been paid (or funded in part) by the United States in the manner provided
73 by the following acts of Congress, and as shown by the public documents hereinafter mentioned. As to that money there is now no controversy.

Act of July 29, 1848, sections 4 and 5 (9 Stat. L., 264); act of August 7, 1848 (9 Stat. L., 339); act of September 30, 1850 (9 Stat. L., 556, line 16); act of February 27, 1859 (9 Stat. L., 572); act of March 3, 1851 (9 Stat. L., 617); act of February 27, 1851 (9 Stat. L., 573); act of May 31, 1854 (10 Stat. L., 291); act of August 4, 1854 (10 Stat. L., 558); act of July 31, 1854 (10 Stat. L., 300); act of March 3, 1855 (10 Stat. L., 700); act of August 18, 1856 (11 Stat. L., 92); act of June 14, 1858 (11 Stat. L., 362); act of July 27, 1868 (15 Stat. L., 228); act of March 3, 1875 (18 Stat. L., 447); act of August 15, 1870 (19 Stat. L., 197); act of March 3, 1877 (19 Stat. L., 291).

Said *per capita* money had not been paid and no adjustment of the amount of the *per capita* money, and no final settlement and determination as to exactly what individuals should be included among those entitled to the removal and subsistence money had been reached at the date of the treaty of 1846 (9 Stat. L., 871).

III.

No part of the sum of $214,000 arising from the commutation of the previously existing permanent annuity of $10,000 mentioned in article 11 of the treaty of 1835–'36 (7 Stat. L., 483) has been paid to the present claimant in its organized capacity, nor to any of the

Cherokee Indians who have remained east of the Mississippi river. And they have received no part of the funds arising from the sale by the Cherokee Nation of any of the lands ceded to it by the United States west of the Mississippi river under the treaties of 1828 (7 Stat. L., 310); of 1833 (7 Stat. L., 415); of 1835–'36 (7 Stat. L., 478); of 1846 (9 Stat. L., 871).

IV.

The Cherokee Nation, made defendant in this action by the act of March 3, 1883, ch. 141 (22 Stat. L., 585), is organized and exists by virtue of the treaties and laws of the United States and its own constitution and laws. Its history, powers, and jurisdiction, and the composition of membership are shown thereby, and by the public documents hereinafter mentioned and the public history of the country.

V.

The permanent annuity-fund money, $214,000, mentioned in article 11 of the treaty of 1835–'36, and referred to in Finding III, was appropriated by Congress by the act of July 2, 1836 (5 Stat. L., 73), and has been invested, and the investments thereof are now held by the United States in trust.

The net income of these investments has been annually paid to such person or persons as have been authorized or appointed by the Cherokee Nation to receive the same (treaty of 1835–'36, art. 10, 7 Stat. L., 482; constitution of the Cherokee Nation of 1827, art. 4, sec. 25, p. 126; constitution of 1839, art. 4, sec. 24, p. 12; act of Congress of March 3, 1875, ch. 132, sec. 1, 18 Stat. L., 448; public documents).

74 VI.

Under the provisions of the treaty of July 19, 1866, (14 Stat. L., 799,) Articles XV, XVI, XVIII, many sales of tracts of land have been made from the domain ceded to the Cherokee Nation under the treaties of 1828, 1833, 1835–'36, and 1846, and the proceeds thereof have been invested as provided in Article XXIII of the treaty of 1866 (act of May 11, 1872, 17 Stat. L., 98; act of June 5, 1872, 17 Stat. L., 228; act of February 28, 1877, 19 Stat. L., 265; act of March 3, 1875, 18 Stat. L., 461; act of June 16, 1880, 21 Stat. L., 248; act of March 3, 1881, 21 Stat. L., 422; act of March 3, 1883, 22 Stat. L., 624; public documents). The remainder of the lands are unsold.

Out of these investments of these trust funds payments have been made to the Cherokee Nation under the provisions of said Article XXIII and the following acts of Congress: Act of February 14, 1873, sec. 4 (17 Stat. L., 462); act of March 3, 1875, ch. 132, sec. 13 (18 Stat. L., 451); act of June 16, 1880 (21 Stat. L., 248); act of March 3, 1883, ch. 142 (22 Stat. L., 624).

There is still remaining a large fund thus invested and held by the United States in trust.

The net income of said fund thus invested has been annually paid to the Cherokee Nation, under the provisions of said Article XXIII, the treasurer thereof having received the same according to the terms of the nation's constitution.

VII.

At the time of taking the latest census of the Cherokee Nation (A. D. 1880) there were 20,336 persons belonging thereto. Of this number 4,428 are adopted, being white, other Indians, and colored persons.

At the time of taking the latest census of the Cherokee Indians residing east of the Mississippi river alleged to belong to claimant's band (A. D. 1883), there were 2,956 persons. This census was taken by an agent appointed by the Secretary of the Interior under the provisions of the act of August 7, 1882 (22 Stat. L., 328), and the act therein referred to, of July 27, 1868 (15 Stat. L., 228), and was approved by the Secretary and the Commissioner of Indian Affairs. It shows the residences of said Indians as follows: 1,881 in North Carolina, 758 in Georgia, 213 in Tennessee, 71 in Alabama, 3 in South Carolina, 11 in Kentucky, 8 in New Jersey, 5 in Virginia, 1 in Illinois, 3 in Kansas at present, 1 in Colorado at present, 1 in California at present.

VIII.

The following public documents and printed volumes were cited and relied upon for the historical facts involved in the case, and are made part of the findings of fact: Ex. Doc. H. of R., No. 104, first session, Twentieth Congress; Doc. No. 71, H. of R., first session, Twenty-third Congress; Ex. Doc. H. of R., No. 286, first session, Twenty-fourth Congress; Doc. No. 99, H. of R., first session, Twenty-fifth Congress; Ex. Doc. Senate, No. 120, second session, Twenty-fifth Congress; Report No. 391, H. of R., first session, Twenty-eighth Congress; Ex. Doc. Senate, No. 298, first session, Twenty-ninth Congress; Ex. Doc. Senate, No. 408, first session, Twenty-ninth Congress; Ex. Doc. H. of R., No. 65, first session, Thirtieth Congress; Senate Report No. 176, first session, Thirty-first Congress; Ex. Doc. 169, second session, Forty-third Congress; Ex. Doc. H. of R., No. 79, second session, Forty-seventh Congress; Ex. Doc. H. of R., No. 196, first session, Forty-seventh Congress; Ex. Doc. No. 17, second session, Forty-eighth Congress; Cherokee Nation's constitution and laws, edition of 1852, in two parts; "The Public Domain, its History," &c., A. D. 1882; Memoirs of Lieutenant General Scott, A. D. 1864, vol. 1, pp. 317–330.

75

Agreement of the Parties.

In the case of the Eastern Band of Cherokee Indians *v.* The United States and the Cherokee Nation, it is agreed that all the reports, public documents, and printed publications referred by either party at the trial in the Court of Claims, to be mentioned in the findings of facts, may be used on appeal, without being reprinted, for all they

are worth as to the facts upon which the questions of law in controversy arise.

SHELLABARGER & WILSON,
Attorneys for Claimant.
WM. A. PHILLIPS,
Attorneys for Cherokee Nation.
THOMAS SIMONS,
Assistant Attorney General.
CURTIS & BURDETT,
Of Counsel for Cherokee Nation.

We agree to the foregoing findings of fact, in aid of the facts as they appear in the public documents therein set out, except as in any particular they should be found to be in conflict with said documents.

SHELLABARGER & WILSON,
Attorneys for Claimant.
THOMAS SIMONS,
Assistant Attorney-General.
WM. A. PHILLIPS,
Attorney of Fact and Record.
CURTIS & BURDETT,
Of Counsel for Cherokee Nation.

Conclusion of Law and in Equity.

On the facts the court decides that the claimant has no right in law or equity to any share or portion of the moneys, stocks, and bonds, held by the United States in trust for the Cherokees, arising out of the sales of lands lying west of the Mississippi river, nor in and to a certain other fund, commonly called the permanent annuity fund, mentioned in the act of March 3, 1883, (22 Stat. L., 585), referring the case to this court, and that a decree must be so entered.

76 VII. *Opinion of the Court.*

RICHARDSON, *C. J.*, delivered the opinion of the court:

Under the provisions of the act of March 3, 1883, Ch. 141 (22 Stat. L., 585), the claimant brings this action against the United States and the Cherokee Nation to recover a proportional part of the two funds held by the United States in trust.

It is necessary to a correct understanding of the case to review the history of the Cherokee Indians, the Cherokee Nation, the Eastern Band of Cherokee Indians, and their relations to each other, as well as to the United States, and to point out how the funds now in controversy had their origin. We are not aware of a single material fact in controversy. All parties rely upon facts appearing mostly in treaties, laws, and public documents.

As the act referring the case gives jurisdiction in equity as well as at law, a finding of facts is not required (the Hot Springs cases, 10 C. Cl's., 289, 433; affirmed on appeal, 92 U. S., 698). But, for convenience, and with the consent of the parties, we have set out such

facts outside of the public archives as seemed at the argument to have some bearing on the construction of the treaties involved, and have mentioned all the public documents and printed publications referred to by either party, which, although the court above would probably take judicial notice of their contents as we have done, the parties have agreed may be used on appeal without being reprinted in the findings.

The Cherokee Indians prior to the year 1785 had inhabited or roamed over a large territory of land, having no defined boundaries, extending from the Gulf of Mexico to New York; but were dwelling mostly within what are now the States of North Carolina, Georgia, Tennessee, and Alabama.

Previously to that year, in 1878, the State of North Carolina had granted to the Cherokee Indians a tract of land within its borders to be "reserved unto the said Cherokee Indians and their nation forever." This grant was held by the supreme court of North Carolina to convey a fee-simple estate, instead of a mere usufruct conceded by the white race to the aboriginal Indians by right of occupancy (Eu-che-lah *v.* Welch, 3 Hawkes, 154).

On the 28th of November, 1785, the United States made their first treaty with these Indians through "the headmen and warriors of all the Cherokees," at Hopewell on the Keowee, by which was "allotted to the Cherokees for their hunting grounds" a large tract of land within what are now the States of North Carolina, South Carolina, Alabama, Georgia, and Tennessee, in which was included the lands previously granted to them by the State o fNorth Carolina (7 Stat. L., 18).

July 2, 1791 (7 Stat. L., 39), the United States entered into another treaty with the "chiefs and warriors of the Cherokee Nation on the part and behalf of the said nation." The principal features of this treaty are the readjustment and establishment of the boundary between the United States and the Cherokee Nation, and the agreement of the former to pay annually to the latter the sum of $1,000, which was increased to $1,500 by an additional article (7 Stat. L., 42). Here began the annuities which were all finally commuted by the funding of $214,000 for the benefit of the Cherokee Nation under arti-
77 cle 11 of the treaty of 1835–'36 (7 Stat. L., 483), out of which grows one of the matters in controversy here. Additional annuities were granted for lands ceded, &c., as follows: The treaty of 1794 (7 Stat. L., 43) increased the amount to $5,000; the treaty of 1798 (7 Stat. L., 62) added $1,000; the treaty of 1804 added another $1,000, and the treaty of 1805 (7 Stat. L., 93) granted an addition of $3,000. Thus, in the year 1805, the annuities had reached the sum of $10,000.

This was annually paid to the Cherokee Nation in its organized capacity as represented by the Cherokee Indians residing within the boundaries of its territory east of the Mississippi river until after the treaties of 1817 and 1819 (7 Stat. L., 156, 195).

In the mean time there were several other treaties made between the parties, adjusting and curtailing the boundaries of the nation, ceding to the United States parts of its lands for cash payments and

annuities for limited periods and making some other provisions not material in this case (7 Stat. L., 93, 94, 101, 103, 139, 148).

The historical facts which led to the making of the treaties of 1817 and 1819 are matters of considerable importance.

At the time of the first treaty of 1785 there were about fifty Cherokee towns or settlements within the territory confirmed to the Indians. Not many years thereafter the inhabitants of the upper towns at or near the Smoky Mountain and Blue Ridge, mostly if not wholly in the State of North Carolina, and those of the lower towns in the valley of the Mississippi, became divided to some extent in their habits and tastes. Those in the upper towns desired to engage in the pursuits of agricultural and civilized life in the country they occupied, and for that purpose they asked for a divisional line between the two classes of towns. Those of the lower towns desired to continue the hunter life, and on account of the scarcity of game where they lived they wished to remove across the Mississippi river and settle on vacant lands of the United States. The President of the United States was appealed to, and on the 9th of January, 1809, he replied to the parties as follows: "The United States, my children, are the friends of both parties, and, so far as can be reasonably asked, they are willing to satisfy the wishes of both. Those who remain may be assured of our patronage, our aid, and good neighborhood. Those who wish to remove are permitted to send an exploring party to reconnoiter the country on the waters of the Arkansas and White rivers. * * * When this party shall have found a tract of country suiting the emigrants and not claimed by other Indians we will arrange with them and you the exchange of that for a just portion of the country they leave, and to a part of which, proportionate to their numbers, they have a right."

By common consent of the Indians and the approval of the President a divisional line was established along the ridge between the Hiwasse and Hightower rivers; on the one side and the other of which the respective parties could reside and there each best preserve the habits of the people. (Senate Doc. No. 298, first session Twenty-ninth Cong., p. 173, 7 Stat. L., 156.)

A more important result which followed was the emigration, which commenced at once, from the old territory of the Indian nation to the unoccupied lands of the United States on the west side of the Mississippi river now embraced within the State of Arkansas. This con-
78 tinued regularly until, in the course of the next following eight years, nearly or quite one-third of all the Cherokees had settled in their new western home in the wilderness. Those who remained east conducted the affairs of the nation, to which was regularly paid by the United States the annuity of $10,000 heretofore referred to. Of this annuity and of the other common property of the nation east of the Mississippi river those who went west had no share or benefit. They lived a hunter's life on the public domain, but not within any defined boundaries, very much as their ancestors lived in the east before the treaty of 1785. Having increased in numbers and importance, these Western Cherokees desired a cession of land for their exclusive use.

Under such circumstances the treaty of 1817 was entered into (7 Stat. L., 156). The parties to it were, first, the United States; second, the chiefs, headmen, and warriors of the Cherokee Nation east of the Mississippi river; third, the chiefs, headmen, and warriors of the Cherokees on the Arkansas river. Its principal provisions were these: The whole Cherokee Nation ceded to the United States certain parts of its lands lying east of the Mississippi. The United States ceded to that part of the Cherokee Nation on the Arkansas as much land on said river and on the White river as they received from the Cherokee Nation East, "acre for acre, as the just proportion due that part of the nation on the Arkansas, agreeable to their numbers." They agreed to pay for all improvements of real value on the lands ceded to them by the nation. They further agreed to give a reservation of 640 acres of land to each and every head of any Indian family residing on the east side of the Mississippi river, on lands surrendered to the United States, who might wish to become citizens of the United States. They encouraged emigration by promising to give a gun and other articles to each poor warrior who would remove west.

It was further agreed that the annuity should be divided between the two parts of the nation, east and west, agreeably to their number, to be determined by a census taken as therein provided.

The treaties previously made between the United States and the Cherokee Nation were to continue in full force with both parts of the nation.

This was soon followed by the treaty of 1819 (7 Stat. L., 195), the Cherokees on both sides of the Mississippi river, east and west, having come together and acknowledged themselves as one nation, by the terms and agreements of the treaty of 1817 entered into by them separately. This next treaty of 1819 was made with the "chiefs and headmen of the Cherokee Nation of Indians" as one body-politic. By it the nation makes further cession of lands to the United States from the Indian territory east, "in full satisfaction of all claims which the United States have on them, on account of the cession to a part of their nation who have or may hereafter emigrate to the Arkansas."

The United States agreed to pay for all improvements on the ceded territory as in the former treaty, and to "allow a reservation of 640 acres to each head of any Indian family residing within the ceded territory, those enrolled for the Arkansas excepted, who choose to become citizens of the United States in the manner stipulated in said treaty." Thirty-one persons are also specifically named in article III and in a list annexed to the treaty, who are to have each a reservation of 640 acres, to be laid out as therein described.

79 The exact number of those who took reservations under those two treaties does not appear, and is not material to the issues here involved. But that there were many who did take them is apparent, as the right to do so continued until taken away by the treaty of 1835–'6, the thirteenth article of which (7 Stat. L., 484) confirmed the title to those reservees whose lands had not been sold by the United States; and some of these titles have been litigated and

upheld by the courts (Eu-che-la *v.* Welch, 3 Hawkes, 155, 174; Blair *v.* Pathkiller, 10 Tenn., 406; Jones *v.* Evans, 13 Tenn., 323; Ex. Doc. H. of R. No. 104, 1st sess., 20th Cong.)

By the sixth article of the treaty of 1819 it was agreed, apparently to avoid the taking of a census, that the annuity to the Cherokee Nation of $10,000 should be paid, two-thirds to the Cherokees east of the Mississippi and one-third to the Cherokees west of that river, as it was estimated that those who had emigrated and who had enrolled for emigration constituted one-third of the whole nation. But this provision was not to take effect if objected to by the Cherokees west before the expiration of one year. No objection was made, and the annuity was thereafter paid in the manner provided by that article until it was funded under the provisions of the treaty of 1835–'36, since which time the net income has been paid to the nation as a body-politic.

Next came the treaty of 1828 (7 Stat. L., 311), which was made exclusively with the "chiefs and headmen of the Cherokee Nation of Indians west of the Mississippi." Thereby the United States "agreed to possess the Cherokees, and to guarantee it to them forever, 7,000,000 acres of land," described by bounds, situated further west in what is now the Indian Territory. The United States further guaranteed to the Cherokee Nation a perpetual outlet west and a free and unmolested use of all the country lying west of the western boundary of the described limits and as far west as the sovereignty of the United States and their right of soil extended, and further agreed to pay to the Cherokees certain sums of money and the expenses of removal and the costs of improvements left behind.

The eighth article offered inducements to the Cherokees in the east to join their brethren in the west by the agreement on the part of the United States to pay the cost of their emigration and to give to each head of a family a gun and other articles, and to those from Georgia a sum of money in addition.

By the seventh article the Cherokee Nation re-ceded to the United States the land in Arkansas ceded to it by the treaties of 1817 and 1819.

The treaty of 1833 (7 Stat. L., 414), made with the chiefs and headmen of the Cherokee Nation west of the Mississippi, did little but readjust the boundaries of their western lands.

It was evidently intended and expected on the part of the United States Government and the white people of North Carolina and Georgia that all, or nearly all, of the Indians in those States should remove west. As early as April 24, 1802, the United States had entered into a written agreement with Georgia by which they were to extinguish the Indian title to all the lands within that State in consideration of the cession of its Western lands. ("The Public Domain," p. 80.) North Carolina also, without having any written agreement to that effect, claimed that the United States were bound in like manner to extinguish the Indian titles to lands within its boundaries on account of a like cession of its western lands ("Doc. H. of R. 71, first session Twenty-third Congress").

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But emigration went on slowly, and was little, if any, increased by those treaties.

The white people of Georgia and North Carolina became impatient and often excited at the continuance of the Indians among them, especially in the former State. Severe laws were passed to their detriment and for the purpose of driving them away, among others one in 1830 making it a penal offense for the Cherokees to call a council or legislative assembly in their Territory, or to hold such council or assembly, &c. They were persecuted in one way and another until many of those in Georgia fled from their lands and took refuge elsewhere. The acts of oppression are too numerous to mention, but the annals of hisiory abound in the recital of them. In North Carolina they were not dealt with so harshly, but their removal from that State also was most earnestly desired by the people (Ex. Doc. H. of R., No. 71, first session, Twenty-third Congress.) The case of The Cherokee Nation *v.* The State of Georgia, 1 Peters, 1, more fully reported in a separate volume by Richard Peters in 1831, where the offensive laws and the complaints of the Indians are all set out, shows some of the troubles of the Indians.

On account of the agreement on the part of the United States to extinguish the Indian titles to lands in the State, and the feeling, desire, and earnestness of the white people to get rid of the Indians themselves from the boundaries of their States, it became the fixed, determined, and aggressive policy of the United States Government to induce, and in case of necessity to compel, all the Cherokee Indians in the States of Georgia, North Carolina, Alabama, and Tennessee, except those who had become, or were to become, citizens of those States, to remove and join their brethren in the Indian Territory west, and to break up the Indian nation as a body-politic in the East. It was with that policy, and under those circumstances, that the treaty of 1835–'36, called the treaty of New Echota (7 Stat. L., 478) was entered into. To carry out that policy, immense sums of money, millions of dollars, not promised by treaties, have been appropriated by Congress and paid in the spirit of unbounded liberalty, yielding to the demands of the Indians in almost every case, perhaps in every case without exception, and paying in one way and another, to an extent more than twice as much as they agreed to pay by the terms of the treaties, as is shown by the numerous appropriation acts scattered through the Statutes at Large.

The first step in that direction was an effort to negotiate with the Cherokee nation for the purchase of its territory in the States and for the removal of all the Indians to the Territory ceded to those in the West. In 1835 the question of purchase was before the Senate, and a resolution was adopted declaring $5,000,000 a fair price to be paid for the lands. Dissensions, however, arose among the Indians themselves in relation to the sale of lands and their own removal. One party, headed by John Ross, the principal chief, with whom were a very large majority of his people, who were willing to sell their common lands if a sufficiently large price could be obtained, with the privilege of remaining east on lands to be purchased by them, were earnestly opposed to removal west on any terms.

The other party, composed of a comparatively smaller number of persons, were disposed to go west, and were willing to sell the lands at the Senate's price.

81 Delegations went to Washington. The terms of a treaty were proposed by officers of the United States after much discussion, but they failed to satisfy the Ross party, who became bitterly opposed to their adoption.

The propositions for a treaty thus prepared were taken to the Cherokee country, and upon notice given by the United States commissioners the people of the nation were convened at New Echota, in Georgia, December 21 or 22, 1835, to take them into consideration. A council was organized by the choice of a presiding officer and secretary. Most, if not all, of the Ross party abstained from attendance. The next day the council received the propositions of the commissioners, who explained them in both the English and Cherokee languages. A committee of twenty Indians was appointed to examine and report upon the same. On the 28th of December, 1835, this committee reported some matters of difference and how they might be remedied. It was then resolved that the committee of twenty be authorized to conclude the treaty and to sign the same in behalf of the Cherokee Nation, and this they did the next day, December 29, 1835. (Doc. H. of R., 286, 1st session, 24th Cong., p. 112.)

The treaty was laid before the Senate for ratification at once. Its ratification was actively opposed by Ross and his party. The friends of the measure among the Indians as well as the Administration desired some changes, and March 1 supplementary articles were agreed upon and signed. The treaty and the supplementary articles were then ratified together by the Senate, and were proclaimed by the President May 23, 1836. (7 Stat. L., 478, 488.)

By this New Echota treaty, among other provisions, the Cherokee Nation ceded, relinquished, and conveyed to the United States all the lands owned, claimed, or possessed by them east of the Mississippi river for the sum of $5,000,000, &c. (article 1), and the Cherokees agreed that they would remove to their new homes, in the Indian Territory, ceded to the Cherokees west, within two years from the ratification of the treaty (article 16), subject to the provision that those individuals and families of the Cherokee Nation that were averse to a removal to the Cherokee country west of the Mississippi and were desirous to become citizens of the States where they resided, and such as were qualified to take care of themselves and their property should be entitled to receive their due proportion of all the personal benefits accruing under the treaty for their claims, improvements, and *per capita*.

On the part of the United States, after reciting the cession of the 7,000,000 acres of western lands to the Western Cherokees by the treaties of 1828 and 1833, described by boundaries, it was agreed to "guaranty to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said 7,000,000 acres, as far west as the sovereignty of the United States soil extends," and it being "apprehended by the

Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west," the United States agreed to convey to said Indians and their descendants by patent another adjoining tract of 800,000 acres, and the whole was afterwards so conveyed to the nation as a body politic (article 3) by a patent duly issued.

The United States further agreed to pay $5,000,000 for the lands ceded to them, and after deducting out of that sum the amount expended for the improvements, former claims for spoliation,
82 removal, subsistence, and other matters which were to be paid by the United States, they agreed that the balance should be divided equally between all the people belonging to the Cherokee Nation east and such Cherokees as had removed west since June, 1833, (article 15). Thus arose the *per capita* money about which there was much controversy afterwards, as there was about the removal and subsistence money, $53.33 to each person, promised by article 8.

There is no controversy now about the *per capita* money, nor about the removal and subsistence money, and their only importance in this case is in explanation of the terms of the subsequent treaty of 1846, which are involved in the present issues.

The eleventh article provided that "the Cherokee Nation of Indians, believing it will be for the interest of their people to have all their funds and annuities under their own direction and future disposition, hereby agree to commute their permanent annuity of $10,000, to the sum of $214,000, the same to be invested by the President of the United States as a part of the general fund of the nation."

Of the two claims referred to this court and set out in the petition, one is founded on this article of the treaty. The present claimant band seeks to recover such a share of this commutation fund, and the interest thereon ever since it was invested by the United States, as will be in proportion to the number of its members as compared with the citizens of the Cherokee Nation who live west on the common lands, all the income having been paid to the Cherokee Nation as a body-politic and none to the claimant.

The other claim is to the same proportional share of the money received from sales of portions of the common lands ceded to the nation by the United States, which money has been funded and held in trust, according to the terms of agreements between the United States and the Cherokee Nation, and the income whereof and part of the principal have been paid to or for the benefit of the Cherokee Nation as a body-politic and none to the claimant.

While this treaty was before the Senate for ratification there appeared at Washington one William H. Thomas, from North Carolina. He was the agent and held a power of attorney to act for most of sixty heads of families composed of about 333 persons, who claimed to be citizens of North Carolina, either as reserves under former treaties or otherwise, and who intended to remain such, and did not wish to remove west. That such was their character is manifest from the public documents. (Ex. Doc. 120, 2d session, 25th Cong.,

pp. 610, 612, 616; Ex. Doc. No. 408, 29th Cong., 1st session, p. 17.) He does not seem to have been given any consideration by the treaty-making power, nor by the authorities at Washington. But three days after the treaty was promulgated he succeeded in having a written document signed by a portion of the Cherokee Indians East who signed the treaty, and two persons who claimed to represent the Cherokees West, and which he himself signed, purporting to settle some construction to be given to the treaty. That document he filed in the Indian Office July 4, 1836. (Doc. 120, 2d session, 25th Cong., p. 610.)

We do not regard that agreement as entitled to any weight in the present case, for several reasons. The signers of it were never authorized, either by the Cherokee Nation or by the Western
83 Cherokees, to make any such negotiation or agreement. It was never acknowledged or ratified by either branch of the nation. Any defects in the authority to make the treaty itself, if there were such, have been cured by its ratification in subsequent treaties, but it is not so with this paper. The Attorney General, in 1845, advised that it was "not admissible to establish a contruction of the treaty inconsistent with its own provisions and unauthorized by its language." (4 Opin., 441.)

The meaning of the paper is, in some respects, obscure, much more so than is that of the treaty which it purports to explain; and the contemporaneous construction given to it by Mr. Thomas himself wholly excludes the present claims (Doc. 298, 1st session, 29th Cong., and Doc. 408, 1st session, 29th Cong.) By that construction it would seem that the persons represented by Thomas have received all that it purported to concede to them, and all that they ever claimed until after the organization of the present band, more than thirty years later, as far as we have been able to discover from any documents referred to. We shall have occasion to consider this matter more fully in connection with the treaty of 1846.

Immediately upon the ratification of this treaty steps were taken to execute its provisions. Commissioners were appointed to adjust the claims for improvements, &c., but emigration went on slowly as before. Ross and his party were now as violently opposed to the execution of the treaty as they had been to its ratification. They denounced it as made without authority of the nation, and as void and of no binding effect upon them. So large a number shared those feelings that at the end of the two years assigned for removal only about 2,500 out of 17,000 or 18,000 had gone west.

The authorities at Washington in 1838 took the matter in hand, with the determination to enforce, by whatever means might be necessary, what had all along been known to be the paramount object of the treaty on the part of the United States, the removal west of the whole Cherokee Indians, except such as were, or were to become, citizens of the States. In this they were supported by the white people of the States where the Indians resided. Lieutenant General Scott was sent south with a few regular troops, to which were added volunteer companies from each of the States interested. He was instructed to remove all Indians except those who were en-

titled to remain under the 12th article as citizens (Scott autobiography, vol. 1, page 317). When he had assembled his troops among and around the Indians, their formidable number indicated to the latter that further resistance was useless, and that they must go west either peaceably or by force. Ross yielded to the force of circumstances and the necessities of the case, but not until after some arrangement had been made with him by which a very large sum of money was to be paid to him—as it was afterwards paid—for his assistance and expenses in the removal.

The removal was begun in earnest. The Indians were gathered together at camping grounds preparatory to removal. The country was scoured for runaways and those who concealed themselves, and none were allowed to escape except those who were to become citizens under the 12th article. These were soon all sent west under military guard and put upon the western Cherokee land.

So complete was the removal of the nation, and of all who intended to remain its subjects, that those who went took with them their ancient organization, constitution, and laws, and set
84 them up in their new home without a change of chief, headmen, or rulers. This their council at Aquokia camp on the 1st of August, 1838, resolved upon "after," as John Ross expressed it, "the seizure and captivity of the whole Cherokee people cast by the military power of the United States Government. This resolution was also reaffirmed immediately upon their arrival west.

The whole number thus removed was between sixteen and seventeen thousand, leaving behind between eleven and twelve hundred to become citizens under the 12th article. These last were without an organization and without a collective name. They ceased to constitute the Cherokee Nation and they were not called the Eastern Cherokees. That name followed those who removed, and for a long time was applied to those who involuntarily went west after the treaty of 1835, in order to distinguish them from the "Old Settlers," who had gone at earlier dates.

The fact that those who remained were Cherokee Indians by blood and race could not be blotted out, and they were so called, but their connection with the Cherokee Nation was completely severed.

They had no further voice in its councils nor in its affairs. They were not subject to its laws and they owed to it no allegiance. The Cherokee Nation, as a body-politic, never afterwards recognized them as a part of the nation in any form or manner whatever. The only privilege ever accorded to them by the nation was that they might become citizens and subjects upon removal within its territorial boundaries, and they accord that to all those who are Cherokees by blood or race, wherever they may come from.

They had expatriated themselves from the Cherokee Nation, and had become denizens and subjects, if not citizens, of the States where they resided. Thomas, their agent and attorney, wrote that by the constitution and laws of the State they had the right to vote, though they seldom exercised it, lest by identifying themselves with one political party they should give offence to the other (Ex. Doc. No. 298, 1st session, 29th Congress, p. 181). Whatever organizations

they subsequently effected must have been mere social organizations, with no power, as an independant nation of their own, to make laws or do other national acts. That follows from their relations to the State of North Carolina.

They were never afterwards recognized by the United States as any part of the Cherokee Nation, as a body-politic.

As soon as the Eastern Cherokees reached their new home in the west new dissensions and troubles arose. The new comers were double the number of the "Old Settlers." They set up their own ancient government, and endeavored to make the "Old Settlers" submit to their rule. Against this the "Old Settlers" rebelled by resisting the domination of the intruders, as they regarded them, as far as they were able to do. The "Old Settlers" had an organization of their own, and while they had been willing to receive emigrants in small numbers from time to time, emigrants who came in and joined their existing organization they thought it unjust to turn in upon them a body double their number, to occupy their common lands without remuneration, and to subvert their organization.

Those of the Eastern Cherokees who signed the treaty, or who favored it, were obnoxious to the other Eastern Cherokees who had opposed it. Their leaders were murdered and they were persecuted. Naturally they sided with the "Old Settlers" against the Eastern Cherokees, but the latter were numerically too strong for both
85 of their opponents. The situation of affairs became intolerable to the minority. Discord, disorder, murder, and persecution reduced the whole people to a deplorable condition.

Matters went on in this way until 1845, when each of the three parties sent delegates to Washington with a view to bringing their affairs to a settlement. The "Old Settlers" and the treaty party wanted to divide the territory and the people into two nations. There were other demands to be made on the United States by each of these three parties on account of the terms of the treaty of 1835–'36, and the payments made, and to be made, thereunder.

Commissioners had been appointed by the United States to settle the claims for improvements and for other matters connected with the territory ceded to them on the east of the Mississippi river. A large amount of money had been paid out, and much of it had been misappropriated. On account of the construction given by them to the treaty, nearly all of the $5,000,000 purchase-money had been expended and no *per capita* money had been paid, and there was no means left for paying it.

These were the circumstances which led to the treaty of 1846 (9 Stat. L., 871). The delegates of the respective parties were in Washington at the same time, and there presented to the Executive and the Senate their respective grievances, claims, and demands in two lengthy written documents. These documents, with two from William H. Thomas, of North Carolina, afford much light upon the true meaning and construction of the treaty.

Thomas had been, as we have seen, the agent of some sixty heads of families to prosecute their claims under the treaty of 1835–'36,

and had obtained a written paper from some of the delegates who signed that treaty as to its construction. He now appears at Washington, and presents a written "argument in support of the claims of the North Carolina Cherokee Indians," as their attorney. (Ex. Doc., H. of R., 1st session, 29th Cong., No. 298, p. 171.) Therein he states exactly what their claims are, and it is significant that he not only does not set up either of the claims now in controversy, but he specifies that very commutation fund of $214,000 as having been "transferred west for the use of the whole Cherokee people west of the Mississippi as a national fund," and to that he made no objection, referring to it only as an argument why his other claims should be allowed. He claimed for his clients only the *per capita* money and the removal and subsistence money under articles eight and twelve of the treaty.

Again, on the 16th of June, 1846, he sent to the Senate a memorial, accompanied by the written agreement, signed by the delegates who made the treaty of 1835–'36, and other documents in support of the claims of the North Carolina Indians, with another long argument which he had submitted to the Commissioner of Indian Affairs in March previous. Here also no claim whatever is made either to any part of the permanent fund of $214,000, under the eleventh article of the treaty, or to any share of the common lands west. (Ex Doc. Senate, 29th Cong., 1st session, No. 408). In one of the letters to him from William Rogers, which he presents in support of the claims, the vested funds are specially excepted from the claim (page 6). Thomas himself therein says of his clients, "regarding themselves as permanently settled under the protection of the laws of North Carolina, provision having been made for the removal of such in-
86 dividuals as might become dissatisfied with the country east and desire again to pursue the hunter life in the west, they did not expect or desire any more to be annoyed with enrolling agents; and in anticipation of remaining permanently as a community on the lands they had purchased, and only occupy the lands which might be assigned them west as they chose to go, they had felled the timber—cleared lands, &c." From this it is clear that they did not consider that the treaty gave them any interest in the western lands, except such as might be assigned to them as they chose to go there. (Ex. Doc., Senate, 1st session, 29th Cong., No. 298, p. 298.)

Thus were presented to the treaty-making power, when negotiations for the treaty of 1846 were going on at Washington, the exact claims and all the claims made by the Cherokees East. That treaty was made on the one side by the United States, and on the other side by delegates of those parties constituting the Cherokee Nation, first, "the regular constituted authorities of the Cherokee Nation;" second, the "treaty party;" and, third, "the Western Cherokees or Old Settlers." It will be seen that the North Carolina Cherokees were not made parties to this treaty, and it is evident that they were not regarded by the treaty-making power as forming any part of the Cherokee Nation.

The treaty secures the lands occupied by the Cherokee Nation to

the "whole Cherokee people for their common use and benefit," and requires a patent to be issued for the same. Such a patent had been issued to the Cherokee Nation as a body-politic December 31, 1839.

It provided that all difficulties between the several parties of the Cherokee Nation should be and were settled and adjusted; a general amnesty was declared and all the contending parties were united in amity and friendship, and in political rights. The money claims against the United States were adjusted, a division of the *per capita* money provided for, and each of the three parties of the Cherokee Nation were allowed their respective rights and claims as therein set out. These are not now in controversy.

The union of the whole Cherokee Nation, that is, the three divisions of the people mentioned in the treaty, had been consummated in 1839 by "an act of union between the Eastern and Western Cherokees," and a constitution under which they have always since lived as one nation. The Cherokees in North Carolina have never rejoined the nation, but have continued to live outside of its boundaries, its institutions, and its laws.

The tenth article of the treaty of 1846, which is much relied upon by the claimant in this case, is as follows: "It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in the States east of the Mississippi river had, or may have, under the treaty of 1835 and the supplement thereto."

As the Cherokees here referred to were before the Executive and Senate by their agent and attorney, with the written statement of their rights and claims, and as they did not then present the claims now in controversy, but did present claims for the *per capita* money none of which they had received, and for the removal and subsistence money, their right to which had been denied to them in accordance with the opinion of the Attorney General in 1845 (4 Opin., 435), it amounts almost to demonstration that this article of the treaty had no reference to the matter involved in the present claims, but was inserted to satisfy the Cherokees in North
87 Carolina that the claims which they had presented should not be taken away or abridged.

Thus we have a contemporaneous construction by all parties concerned of the meaning of the treaty of 1835–'36 which excludes the present claims, and that construction is confirmed by the action of all parties after the treaty of 1846. The United States issued the patent for the western lands to the Cherokee Nation as a body-politic, and Congress passed acts by which was paid to every Cherokee Indian in the east his proportion of the *per capita* money, and they funded an amount of money equal to the removal and subsistence allowances for each of such Indians, paid the interest to them regularly, and the principal sum of $53.33 to each one who subsequently went west until after 1852 (act of 1848, July 29, secs. 4, 5, 9 Stat. L., 264), and the balance of principal is held in trust, as will be hereinafter explained.

These settlements with the Indians in North Carolina, so far as

the documents show, appear to have entirely satified all the claims ever made by Thomas or any of the Eastern Indians until after the present organization of the Eastern Band, now claimant in this case, and long after all those who took part in the negotiation of the treaty of 1835–'36, or who were then immediately affected by it, must be presumed to have died.

Had any such claims as are now put forth existed when the treaty of 1846 was made, it cannot be supposed that they would have been omitted from that treaty. Had anybody claimed that the Indians in North Carolina were entitled to a division of the annuity fund created by the 11th article of the treaty of 1835, so important an element of contention, it must be presumed, would not have been passed over, but if the parties intended any such division, their rights would have been set up and settled then and there. Instead of that the income was permitted without objection, so far as we can discover, to be paid to the Cherokee Nation, as a body polotic, during the lifetime of the parties concerned in the treaty at its inception.

The claimant relies much upon the language of the first article of the treaty of 1846, securing the lands west to the "whole Cherokee people for their common use and benefit," as giving the North Carolina Cherokees and the claimant band an interest therein, whenever any part should be sold. Even independently of the contemporaneous construction by all parties, which strengthens our views, we have no doubt that the "whole Cherokee people" there referred to were the three parties into which the Cherokee Nation was then divided by dissentions, and not by locality; first, the "Eastern Cherokees," meaning those who removed west after the treaty of 1835–'36, and who constituted the governing party, or, as their delegates signed themselves, the "Government party;" second, the "treaty party;" and, third, the "Old Settlers," all mentioned in that treaty.

If, however, the whole "Cherokee people" there mentioned included the North Carolina Cherokees, the very language repels the idea of any partition between them. To enjoy the benefit of the common lands they must go and enjoy the same with their brethren, according to the customs, laws, and usages of the nation. There is not a single word in either of the treaties that implies a partition of lands or a divison of the funds of the Cherokee Nation. All
88 is distinctly either declared or implied to be "in common." In clear violation of the idea of common property, the present claimant is seeking a division of it.

Two other treaties have been made with the Cherokee Nation, in neither of which are the Cherokees remaining east provided for or noticed—the treaties of 1866 (14 Stat. L., 799) and 1868 (16 Stat L., 727), relate principally to the internal government of the nation, authorize the settlement of friendly Indians on their lands, by paying for such right and obtaining the consent of the Cherokee council, cede certain lands to the United States in trust for sale, and provide for the investment and disposition of the funds arising from the sales, all for the benefit of the Cherokee Nation as a body-politic.

It is out of sales under these treaties that the land fund now in controversy arises.

We will now return to the Cherokee Indians in North Carolina. Up to 1856, as we have shown, they individually, not as a tribe or band or other organization, had received the interest on $53.33 each, funded for their removal and subsistence west when any of them should go there. The act of 1855 contemplated paying out the whole principal, but that object was never consummated. The act of 1868 (15 Stat. L., 228) provides for taking a new role or census of North Carolina Indians, upon which payments should be made. It also provided that the Commissioner of Indian Affairs should take the same charge of the North Carolina Indians as of other tribes of Indians.

This money finally, in 1875 and 1876, passed into the trust fund held by the United States for the benefit of the Eastern Band. (Act of March 3, 1875, 18 Stat., 447; act of August 15, 1876, 19 Stat., 197.)

This Eastern Band was organized at the suggestion of an officer from the Indian Office after 1868, for the purpose of enabling the Indians in North Carolina and vicinity to transact business with the Government. It is not a nation of itself, and has no connection with the Cherokee Nation, and has never been recognized by the United States or by that nation in any treaty as so connected. It has no power to make laws, its members being all subject to the laws of the States where they live. At most, it can be but a social organization, a little more developed than anything of the kind which had existed there before since the nation went west in 1838, fostered and encouraged by the United States in some matters, but not recognized as a nation in whole or in part. This is manifest from the articles of its constitution set out in the findings, and from the statute provisions in relation to investments held in trust by the United States for their benefit, and otherwise. (18 Stat. L., 447; 19 Stat. L., 197, 291.)

It is not the successor of any organization known to the laws or treaties of the United States, and as a band it has none of the individual rights or claims of those to whom money was promised under the treaty of 1835–1836, nor to any grants of Congress, except such as have been gratuitously given to it. The individual claimants under the treaty of 1835–1836 have probably all died, and if any of their claims were not settled before their deaths, such claims do not pass to the Eastern Band, but belong to their legal representatives. Whether that be so or not is immaterial, as the claimant band is now seeking to recover not individual property, but a divided share of the common property of the nation.

No treaty was ever made with this band nor with the people composing its membership. All the connection the band has
89 with the United States is such as has been created by the laws of Congress, which may be altered by the same power that enacted them; and Congress can make no laws in relation to the band which are in conflict with the laws and constitution of the State of North Carolina, to which these Indians are subject.

The status of the Cherokee Nation, one of the defendants, is entirely different. It has its territorial possession and boundaries, its constitution (very much like the Constitution of the United States), its laws, its executive, legislative, and judicial departments, with none of which can any State or the United States interfere.

Its relations to the United States are fixed by contracts, set out in treaties and laws, to which, as a nation, it has given its assent. The United States, by the terms of those contracts, has become trustee of its funds, which it has agreed to administer according to the provisions of those contracts. As late as January, 1885, in a communication to the Senate, the Secretary of the Interior stated what has always been understood, that "the Department has not considered it the duty of the Commissioner of Indian Affairs or the Secretary of the Interior to interfere with the affairs of the Cherokee Nation, except in the case especially provided for by treaty with that nation." (Ex. Doc. No. 17, 48 Cong., p. 6.)

The Revised Statutes, section 2097, enact what would be the law without the enactment, that "no funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty or by express provisions of law." And in several instances where the funds of this nation, or the money appropriated therefor, have been misapplied by the officers of the United States, through wrong construction of treaty provisions, or otherwise, Congress has made appropriation for the restoration of the same out of the public Treasury.

The Cherokee Nation has a right to stand upon the contracts of its treaties in relation to the funds now in question, and no acts of Congress and no proceedings of the political departments of the Government in connection therewith can take away its vested rights thereto guaranteed by such treaties.

On the part of the claimant, the Eastern Band, it is alleged that its members, being descendents of the ancient Cherokees, they are a part of the Cherokee Nation, and thus entitled to share in its common property, and upon this assumption its claims are principally founded.

If that were so their case would be in no better condition, but rather worse. If they are part of the Cherokee Nation they are subject to its constitution and laws, and must take and enjoy the rights and benefits of the nation, its property, and its privileges, precisely as other citizens or members enjoy them, and not otherwise.

As early as May 6, 1817, when the national organization existed where now mostly reside the members of the claimant band, whose ancestors were acknowledged as part of the nation, it was resolved by its council that "the authority and claim of our common property shall cease with the person or persons who shall think proper to remove themselves without the limits of the Cherokee Nation" (laws of Cherokee Nation, edition of 1852, p. 5). This was understood to be common law of all Indian tribes and nations, and only reaffirmed by this enactment. While a large number of the nation, as it then existed, were living on Arkansas public lands, they re-

ceived no share of the annuities and common funds of the
90 nation until the nation consented, by the treaty of 1817, to a division with them, and even then they did not receive any of the past annuities which, since their removal, had been paid wholly to those of the nation who remained, in accordance with their ancient rules and traditions.

In 1825 it was resolved by the national council that "the lands within the sovereign limits of the Cherokee Nation, as defined by treaties, are and shall be the common property of the nation" (laws, &c., p. 45).

By the constitution of 1827, made at New Echota, where was signed the treaty of 1835, it was declared that "the sovereignty and jurisdiction of this government shall extend over the country within the boundaries above described, and the lands therein are, and shall remain, the common property of the nation. * * * Provided, * * * that whenever any of such citizen or citizens shall remove with their effects out of the limits of this nation, and become citizens of any other government, all their rights and privileges as citizens of this nation shall cease" (laws, &c., p. 119).

Again, in the "act of union between the Eastern and Western Cherokees," signed by the president of the Eastern Cherokees, the president of the Western Cherokees, and by delegates and officers of each division, July 12, 1839, it was declared that "all rights and title to public Cherokee lands on the east or west of the river Mississippi, with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers or derived from any other source, shall henceforth vest entire and unimpaired in the Cherokee Nation, as constituted by this union," (same volume of laws, &c., A. D. 1852, part 2, p. 1).

The constitution which followed the above declaration of union provides in article 1, section 2, "The lands of the Cherokee Nation shall remain common property. Whenever any citizen shall remove with his effects out of the limits of this nation, and become a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease: Provided, nevertheless, that the national council shall have power to readmit by law to all the rights of citizenship any person or persons who may at any time desire to return to the nation, on memorializing the national council for such readmission" (same vol., part 2, pp. 5, 6).

The demands of the present Eastern Band of Cherokees and its members are in conflict with these express provisions of the constitution and laws of the Cherokee Nation to which they are claiming to belong. They are demanding a division of trust funds which the United States hold as the common property, and that, too, while they are living without the limits of the nation and are to all intents and purposes citizens of another government, in utter disregard of the traditions, constitution, and laws of the Cherokee people.

Throughout this opinion we have treated the proceeds of the sale of the common lands as the common property of the nation, precisely as were the lands before such sale. Those proceeds have been

invested, and the income of the investments is paid out in accordance with the terms of the treaty of 1866 (14 Stat. L., 805) for the benefit of the Cherokee Nation as a body-politic.

If the Indians east of the Mississippi river wish to enjoy the common benefits of the common property of the nation, in whatever form it may be, whether in permanent fund or in the proceeds
91 of the sale of common lands, they must comply with its constitution and laws and become readmitted to citizenship as therein provided. They cannot have a divided share of the common property of the nation, and thus gain rights and privileges not accorded to any other Cherokee Indians—the living out of national territory, avoiding subjecting themselves to the laws of the nation, dividing its common fund and common property, and managing their affairs wholly independent of national authority. Such an admission of right might break the nation into innumerable bands and scatter into fractions funds which by treaties with the United States, and by the constitution and laws of the Indians themselves, have been dedicated as common funds to the common and not divided benefit of the nation.

In our opinion the Eastern Band of Cherokee Indians, claimants in this case, have no rights in law or in equity in and to the moneys, stocks, and bonds held by the United States in trust for the Cherokees, arising out of the sales of lands lying west of the Mississippi river, nor in and to a certain other fund, commonly called the permanent annuity fund, mentioned in the act of March 3, 1883 (22 Stat. L., 585), referring the case to this court, and a decree will be entered to that effect.

92 VIII. *Final Decree of the Court.*

THE EASTERN BAND OF THE CHEROKEE INDIANS
vs.
THE UNITED STATES and THE CHEROKEE NATION. } No. 13828.

At a Court of Claims held in the city of Washington on the first day of June, A. D. 1885, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, do order, adjudge, and decree that the claimant has no right in law or equity to any share or portion of the moneys, stocks, and bonds held by the United States in trust for the Cherokees, arising out of the sales of lands lying west of the Mississippi river, nor in and to a certain other fund, called the permanent annuity fund, mentioned in the act of March 3, 1883.

93 IX. *Application of Claimant for and Allowance of an Appeal.*

THE EASTERN BAND OF CHEROKEE INDIANS
vs.
THE UNITED STATES AND THE CHEROKEE NATION, COMMONLY CALLED THE CHEROKEE NATION WEST. } No. 13828.

From the judgment rendered in the above-entitled cause on the

first day of June, A. D. 1885, in favor of the United States and the Cherokee Nation, commonly called the Cherokee Nation West, the claimant, by its attorneys, Shellabarger and Wilson, makes application for and gives notice of an appeal to the Supreme Court of the United States.

SHELLABARGER AND WILSON,
Att'ys for Claimant.

Filed June 9th, 1885.

AT CHAMBERS, *June* 9, 1885.

Allowed.

WILLIAM A. RICHARDSON,
Chief Justice,

94 In the Court of Claims.

THE EASTERN BAND OF CHEROKEE INDIANS
versus
THE UNITED STATES AND THE CHEROKEE NATION, COMMONY CALLED THE CHEROKEE NATION WEST.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the Court and the conclusion of law and in equity thereon of the opinion of the Court, of the final decree of the Court, of the application of the claimant for the allowance of appeal to the Supreme Court of the United States, and of the allowance of same by Chief Justice Richardson.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims, at the city of Washington, this 16th day of July, A. D. 1885.

[Seal Court of Claims. Reipublicæ Civibusque.]

JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

95 Endorsed on cover: Court of Claims. No. 886. The Eastern Band of the Cherokee Indians, appellants, *vs.* The United States and the Cherokee Nation, commonly called the Cherokee Nation West. Filed July 16th, 1885.

MEMORIAL

OF THE

CHEROKEE INDIANS RESIDING IN NORTH CAROLINA,

PRAYING

The payment of their claims, agreeably to the 8th and 12th articles of the treaty of 1835.

JUNE 25, 1846.

Referred to the Committee on Indian Affairs, and ordered to be printed, in connexion with the resolutions of the legislature of North Carolina, on the files of the Senate, relating to the subject.

The memorial of the Cherokee Indians residing in North Carolina, to the Senate of the United States,

SHOWETH:

That when the negotiation of the treaty between the United States and the Cherokees was concluded, that portion of the said Cherokees who resided in North Carolina were neither parties to nor represented at the council that negotiated it, but subsequently were induced to enter into an agreement with the Cherokee chiefs, in lieu of a supplement to the treaty in their favor.

Your memorialists show that, before they would agree to do so, the North Carolina Cherokees specially and emphatically demanded to know of the commissioner on the part of the United States whether those Indians who might remain in North Carolina were to have, and be entitled, per head, to the same allowance as the Indians who might remove to the west; and being assured that they would, they became parties to the agreement, and sincerely co-operated with the United States government in carrying out the treaty—surrendered their homes, moved to other lands purchased, and submitted to the laws of the State.

Your memorialists, who have remained in North Carolina with the assent of the State, have frequently applied to the executive government to be paid accordingly, because that is the true meaning of the treaty; and in respect to other Cherokees who have remained in some of the other States, the treaty was so construed, and they have been accordingly paid; but the executive government have now reversed that decision upon the meaning of the treaty, and consequently your petitioners are not paid.

Your petitioners have annexed to this memorial the short statement of their claim, and proof in support of it, which was exhibited to the Commissioner of Indian Affairs; and he having rejected the same, under the late interpretation of the treaty, it is now respectfully submitted to your honor-

able body, in order that justice may be done to your petitioners by the action of Congress. For your petitioners do humbly submit, that if they are entitled to be paid by reason of the true interpretation of the said treaty, it is necessary to procure a declaratory act, or resolution, to reverse the decision referred to. And if such be not the correct interpretation of the treaty, then it is confidently submitted that good faith and honorable dealing by a great nation like the United States, in dealing with a poor and dependant remnant of an Indian tribe, will secure the passage of an act to pay your petitioners, and thereby to secure to them the consideration for which they stipulated, and which they did not doubt would be promptly discharged.

WM. H. THOMAS,

Attorney for the Cherokees east, and adopted Cherokee.

WASHINGTON CITY, *June* 16, 1846.

Claims of the Cherokee Indians who are remaining in the States of North Carolina, Tennessee and Alabama, for removal and subsistence allowance under the provisions of the 8th and 12th articles of the treaty of 1835.

The 8th article provides that "such *persons* and *families* as, in the *opinion* of the *emigrating agent*, are capable of *removing* and *subsisting* themselves, *shall be permitted to do so*, and they shall be allowed, in full for all *claims* for the same, *twenty dollars* for each member of their families; and, *in lieu* of their one year's *rations*, they shall be paid the sum of *thirty-three dollars* and *thirty-three cents*, if they *prefer it*."

"ART. 12. Those *individuals* and *families* of the Cherokee nation that are *averse* to a *removal* to the Cherokee country west of the Mississippi, and *are desirous* to become *citizens* of the *States* where they *reside*, and such as are qualified to take care of themselves and their property, shall be entitled to *receive their due portion of all the personal benefits accruing under this treaty*, for their *claims*, *improvements* and *per capita*, as soon as an appropriation is made for this treaty."

The 8th article limits the amount to be paid on claims for *removal* and *subsistence* to $53.33.

In the commencement of the execution of the treaty, the above articles were construed as authorizing the payment of $53.33 to such of the Cherokees as, in the opinion of the agent and Cherokee committee, were deemed capable of removing themselves, or of becoming citizens of the States. The Cherokees who are remaining in the State of Georgia while this construction of the treaty continued, received the amount due them for *removal* and *subsistence* allowance.

Application was subsequently made by the Cherokees remaining in the States of North Carolina, Tennessee and Alabama, for the payment of the same amount as had been paid to their brethren remaining in the State of Georgia. Payment was refused, in consequence of a change of public officers, change of policy, and a different construction placed upon the provisions of the treaty. This makes it necessary, in order to ascertain which construction is right—the ambiguity of the provisions of the treaty having been established by the two constructions placed upon it—to have recourse to well established rules of interpretation.

1st. Will the language used in the treaty bear a construction which will authorize the payment to the Cherokees remaining in the other States the same sum as was paid to the Cherokees of Georgia?

The term "*due portion*," used in the 12th article, is a term used in dividing estates, and means their *exact dividend* of the proceeds of the sale of the common property. "*All the personal benefits*," *which follows*, limits their share to individual benefits, and exempts from distribution the *twelve hundred and sixty-four thousand dollars*, which, out of the proceeds of the sale of the common property, was *set apart* for the exclusive use of the *emigrants* (under the 15th article). "*For their claims, improvements and per capita*" is used to describe of what the personal benefits consisted. Their *claims* were of two kinds—one for *spoliations* committed upon their property, and the other as a commutation of *removal* and *subsistence allowance*, in lieu of receiving these benefits in kind, which, by the 8th article, was limited to $53.33. The balance of the personal benefits was pay for improvements and per capita.

This construction of the provisions of the treaty is made more plain by having recourse to the original propositions of the government of the United States upon which the treaty is based.

On the 16th of March, 1835, propositions, acceptable to the government and to the Cherokee chiefs in favor of a treaty, were drawn up and signed at the city of Washington, which were to be submitted to the Cherokee people for their approval by the Rev. John F. Schermerhorn, a commissioner appointed by the President for that purpose. These propositions were accompanied by an address in favor of their acceptance from President Jackson. The 14th article of the propositions, which made provision for such as desired to remain east, provides that "*those individuals* and *families of the Cherokee nation* that *are averse to a removal to the Cherokee country west of the Mississippi*, and are desirous to become *citizens* of the *States* where they *reside*, and such as, in the *opinion* of the *agent*, are qualified to take care of themselves and their property, shall be entitled to receive their *due portion of all the personal benefits accruing under this treaty, for their claims, improvements, ferries, removal and subsistence*." (See original, on file in the War office.)

The following instructions in reference to the class expected to remain east were issued by the Secretary of War to the commissioners appointed to negotiate the treaty:

"The great object being to insure the entire removal of the tribe, no reservations will be granted. If individuals are desirous of remaining, they must purchase residences for themselves." (Senate document 120, page 102.)

After Mr. Schermerhorn arrived in the Cherokee country, to a council which was convened for the purpose of hearing the propositions of the government, and accompanying address from the President of the United States, he thus expounded the treaty:

"It makes provision (said he) for such *Cherokees as do not wish to remove west of the Mississippi*, and wish to *become citizens* of the *States*. They shall have paid to them here all that is due them for their *claims, improvements*, and *per capita allowance, removal*, and *subsistence*; but

they must *purchase* their own *lands* like other *citizens*, and settle where they please, subjects of the *laws* of the *country* where they *live*." (See Senate document No. 120, page 459.)

The Cherokees insisted upon reservations being granted in favor of such of their people as might desire to remain east, and finally refused to assent to the treaty unless a provision was added which secured to them their homes. This resulted in a clause being added to the 12th article, which granted *pre-emption rights to each head of a family* who remained east for 160 *acres of land*, to be located in the States of North Carolina, Tennessee, and Alabama, which was the only *change* made in the *original propositions* in reference to the class expected to remain east, as appears by the commissioner's journal of the negotiation that accompanied the treaty. (See Senate document No. 120, page 513.)

Previous to the conclusion of the treaty of 1835, the Cherokee government had ceased to exist, in consequence of the tribe having passed under the dominion of the authorities of the States. The portion of the tribe which resided within the chartered limits of the State of North Carolina, who lived on the lands granted to them by that State in the year 1783, being separated from the portion of the tribe that concluded the treaty, were not parties to it, nor represented at the council which negotiated it at New Echota, in the State of Georgia. But when it was forwarded to Washington city, for the examination of the President and approval of the Senate, they deemed it proper to employ an agent, who was an adopted Cherokee, to examine its provisions. He did not, however, arrive in Washington until after it had been submitted to the Senate. After examining its provisions, he was of opinion that the word *claims* in the 12th article was a term of such ambiguous meaning, that, to prevent the liability of a construction being placed upon it which would deprive those he represented of their proportion of the money arising from the sale of the common property, he deemed a supplemental article necessary to define the claims for spoliations, and removal and subsistence allowance, said to be provided for therein. The friends of the treaty, including the commissioner and chiefs who negotiated it, insisted that it was explained by the term "*all the personal benefits*," which preceded it, and there could be no danger of any construction being given to the treaty which would deprive the Cherokees who remained east of their *removal* and *subsistence* allowance; but to prevent the possibility of a construction being given so foreign from the intention of the parties, an agreement, signed by the chiefs who negotiated it, would answer the same purpose as desired to be accomplished by the supplement. After the agreement was drawn up, it was subjected to the examination of the Senators from the State of North Carolina—the Hon. W. P. Mangum and the Hon. Bedford Brown—who gave it as their opinion that it would answer the purpose desired. It was accepted in lieu of a supplement to the treaty. It bears date at the time it was subsequently signed by such of the chiefs as did not understand the English language, and reads as follows:

"The delegation, whose names are hereunto subscribed, for the Cherokees who have emigrated to, and are expected to emigrate to their new homes west of the Mississippi, and William H. Thomas, (an adopted Cherokee,) for the Cherokees belonging to, or which shall belong to the following *towns* and *settlements*: *Qualla*, *Alarka*, *Aquona*, *Stekosh*, *and Che-o ih*, with their respective settlements, expected to *remain east*, of the second part:

"Article 1. It is admitted that the Cherokees above mentioned are entitled to *an equal share proportioned* to their *numbers* in all the *lands* belonging to the Cherokee nation of Indians. And, notwithstanding they have been deprived of their share of the annuities since the year of 1820, are nevertheless entitled to all sums in possession of the President of the United States for the use of, and annuities due from, the United States to the Cherokee nation of Indians; their proportionate share of which benefiits was intended to be secured to them by the 12th article of the New Echota treaty, (which is quoted.)

"Article 3. It is further *agreed to*, that if any *construction* be given to any of the articles of the *New Echota treaty*, whereby the *Cherokees* belonging to, or which shall *belong* to said *towns* and *settlements*, shall be deprived of an *equal share* proportioned to their numbers in all the *sums arising* from a *sale* or *transfer* of the *common property*, mentioned in the *first article* of this *agreement*, payable to the Cherokee nation of Indians or people, we will request the *President* and *Senate* of the *United States*, and they are *hereby requested to allow them such supplemental articles thereto* as shall remove such *improper constructions*, and enable them to *receive* their *equal proportioned share as above mentioned.*

"Article 4. It is further understood that *one claim*, to which said *Cherokees desiring* to *remain are entitled* by the 12th article of the New Echota treaty, amounting to *fifty-three dollars* and *thirty-three cents each*, intended to place them on terms of equality with those that *chose to emigrate* in two years from the ratification of the above treaty, who are allowed that sum for *removal* and *subsistence* out of the money arising from the sale of the common property shall *be placed by them* on interest in the *State Bank of North Carolina*, or some other *safe institution*, to furnish those desiring to emigrate to their new homes in the west with removal and subsistence, without which they might not be able to reach their friends. * * * * Should a *division* of the *lands* west of the Mississippi, belonging to the Cherokee nation as a *common property, take place, the above-mentioned Cherokee shall be entitled to have their share laid off for them.*

("Interpreted by Stan Watie.)
" William Rogers
Elias Boudinot
Johnson Rogers
George Welch
John Smith, Arkansas chief
James Rogers, Arkansas chief
John Gunter
Major Ridge

Wm. H. Thomas, (for the North Carolina Cherokees.)
James Foster
Long Shell Turtle
John Fields
James Fields
James Starr
Andrew Ross
Stan Watie."

Attest: JOSEPH A. FOREMAN.

On the 13th of October, 1837, the Senate passed a resolution calling on the Secretary of War for copies of papers relating to the Cherokee treaty of 1835. On the 12th of January, 1838, a report was made by the Indian office, in compliance with said resolution. What purported to be a copy of this agreement, so far from being a copy, one entire article was left out, without any mark being made to show that any part was not included. And what is still more remarkable is, that the article left out happened to be

the explanation by the chiefs who signed the treaty, of the 12th article of the treaty, in relation to the claims of the North Carolina Indians, being entitled to commutation for removal and subsistence allowance of $53 33 each. (As a proof of the correctness of this statement, allow me to refer you to Senate Doc. No. 120, page 616.) By leaving out that article it was made to appear, in the copies printed for Congress, that the North Carolina Indians not even claimed any commutation for removal and subsistence. There is no proof that the article was intentionally left out to defeat those claims, and it is possible that it was the result of accident; but the effect on the claims of the Indians was fully as injurious as if had been intentional.

WASHINGTON CITY, *February* 1, 1840.

SIR: In reply to your inquiry, I have to state that I was one of the negotiating committee, who, on the part of the Cherokees, entered upon the treaty of December, 1835, with the government of the United States, and was also one of a sub-committee appointed by the first mentioned committee to examine said treaty with a view to ascertain whether it was such a one as ought to be signed by the committe of negotiation.

It was the understanding of the parties to this treaty, before it was signed that there were many families and persons amongst the Cherokees so averse to a removal to the west, that it was deemed politic and just to make the terms of the treaty such as to give perfect freedom of choice to all to go or stay, as they might prefer, excepting such only as might be deemed incompetent to "take care of themselves and property."

This object was never lost sight of. The sub committee most particularly insisted upon it; and not only upon the liberty of choice, but also upon securing to those who might prefer to remain a share of the moneys arising from the sale of the country, equal in every respect (the vested funds excepted) to that secured to the emigrants. I recollect very distinctly that when the 12th article of said treaty was under consideration, the sub committee objected to it as not being couched in language sufficiently explicit to put it beyond all doubt that those desirous to become citizens of the United States were to receive their *removal and subsistence money*. The commissioner of the United States was appealed to on this particular point; and, in explanation, stated that the words "due portion of all the personal benefits accruing under this treaty" were so comprehensive as to preclude all idea of any interpretation by any one so as to deprive those choosing to remain of their removal and subsistence money. He asked, is this not a personal benefit? If so, it is secured to them beyond a doubt. With this explanation the sub-committee were satisfied, and reported the treaty thus explained to the committee of negotiation. And it was so explained by the commissioner to the people; and, with this explanation, signed and sealed. I have further to state that such a construction as this has been given to this article of the treaty, so far as myself and many others are concerned, who are now, and have always been residing on the east of the Mississippi. We have received our removal and subsistence money.

I am, respectfully, your friend,

WILLIAM ROGERS.

WILLIAM H. THOMAS, Esq.

WASHINGTON, *February* 3, 1840.

From an acquaintance of many years standing with Mr. Wm. Rogers, the writer of the foregoing letter, I have no hesitancy in saying I consider Mr. Rogers a man of integrity and veracity, and, therefore, any statement coming from him entitled to full credit.

WILSON LUMPKIN.

WASHINGTON, D. C., *April* 25, 1845.

DEAR SIR: The statement made in this letter by Mr. Wm. Rogers, as far as relates to my observations and expositions of the treaty to the Indians, is correct.

J. F. SCHERMERHORN.

WM. H. THOMAS.

WASHINGTON CITY, *January* 30, 1840.

SIR: In reply to your inquiries, I will state, unhesitatingly, that I was present when Mr. Schermerhorn, as the commissioner on behalf of the United States, submitted to the Cherokee Indians the propositions on which was based the treaty of the 29th December, 1835, (and had examined its provisions before it was submitted.) He distinctly informed them that such as desired to remain east, and become citizens of the States, would be entitled to receive all the personal benefits of the treaty, including their claims for removal and subsistence. This was at Red Clay council ground, in October, 1835.

After the same treaty was concluded, and submitted to the Senate of the United States, for ratification in the spring of 1836, I well recollect that you applied to Mr. Schermerhorn in my presence to know if the 12th article of the treaty secured to the Cherokees who should remain east commutation for removal and subsistence allowance of $53.33 each, with all the other advantages of the treaty? and his answer was, that on that point there could not remain a doubt, as such was the intention of the parties to the treaty; and on your requesting my opinion on the same subject, I gave it in accordance with that of Mr. Schermerhorn, not then, or now, in the least doubting the accuracy of that opinion.

On obtaining the opinions above stated, you agreed to withhold a supplement to the treaty which you had previously prepared, and had deemed necessary, as an explanation for the protection of the interests of the Cherokees in North Carolina, several hundred of whom you at that time fully represented.

All I have stated I should not hesitate to verify in the most solemn form, if necessary.

I am, very respectfully, your obedient servant,

WM. Y. HANSELL,
Of Milledgeville, Georgia.

WILLIAM H. THOMAS, Esq.,
Of North Carolina.

WASHINGTON, *February* 3, 1840.

I have long been acquainted with Wm. Y. Hansell, esq., the writer of the foregoing statement or letter, and consider the statement of Mr. Hansell entitled te credit and respectful consideration.

WILSON LUMPKIN.

WASHINGTON, D. C., *April* 25, 1845.

SIR: I have examined the foregoing letter of Mr. Hansell, and the statements therein made, as far as relates to what I stated to you in reference to the Cherokee treaty, are true.

J. F. SCHERMERHORN.

WM. H. THOMAS.

WASHINGTON CITY, *April* 4, 1836.

SIR: My friend, Wm. H. Thomas, is now in this city from North Carolina, where he resides. He is returning from the north, and has stopped here for a short time to ascertain what is doing, or to be done, with regard to the *Indian treaty*. Mr. Thomas is the *agent*, I believe, legally and fairly constituted, for a *part* of the *Cherokee tribe* of *Indians*. I am informed from gentlemen of high respectability that *Mr. Thomas* has for some years past acted as *the agent* of a *part* of the *Cherokees*, and has been very *serviceable* to *them*.

He is entirely satisfied that a *treaty should* be *made* and concluded with the Indians, which shall *guaranty* to that *portion* of the tribe whose *agent he is* their *just* and *equal share* of the *proceeds* of the *sale*. I called, in company with Mr. Thomas, this day, to see you in the War office, but regret to learn you were absent from indisposition.

I have known Mr. Thomas eight or ten years, and have entire confidence in his honest and upright character.

Your humble servant, and friend,

JAMES GRAHAM,
Member of the House of Representatives from North Carolina.

Hon. LEWIS CASS,
Secretary of War.

May 8, 1846.—A true copy:

S. H. PORTER,
Chief Clerk Indian Office.

WASHINGTON CITY, *April* 6, 1836.

SIR: Mr. Wm. H. Thomas, of Macon county, North Carolina, who will hand you this, is, as he informs me, acting as agent for a part of the Cherokee tribe of Indians, and visits this city on business connected with their affairs. I have advised Mr. Thomas to place before you certain papers and information which he informs me he has in his possession, *touching the treaty lately made with that tribe.*

I have not heretofore had the pleasure of a personal acquaintance with

Mr. T., but from the representation of others, in whom I have entire confidence, he is a gentleman of fair and respectable standing.

I have the honor to be, with much respect, &c.,

B. BROWN,
Member of the Senate from North Carolina.

Hon. LEWIS CASS.

May 9, 1846.—A true copy:

S. H. PORTER,
Chief Clerk Indian office.

The foregoing agreement and communications were submitted to the Commissioner of Indian Affairs by me on the 4th of July, 1836, accompanied with a request that he would obtain a decision by the Secretary of War on the claims of the North Carolina Indians, referred to in the agreement; in reply to which the following letter was received:

WAR DEPARTMENT,
Office Indian Affairs, July 19, 1836.

SIR: Your communication of the 4th instant has been laid before the Secretary of War, with the accompanying documents, relating to the interest of the Cherokees residing in the State of North Carolina in the treaty of December 29th, 1835.

I am instructed to inform you, that it is the impression of the department that the Cherokees in North Carolina have an interest, proportionate to their numbers, in all the stipulations of that treaty.

Very respectfully, your obedient servant,

C. A. HARRIS, *Commissioner.*

WILLIAM H. THOMAS, Esq.,
Scott's Creek, Haywood, North Carolina.

You will perceive in the foregoing decision that it was decided by Gov. Cass, who was at the head of the War Department at the time the treaty was concluded, that the North Carolina Cherokees were entitled, without removal, to all the pecuniary benefits of the treaty. The allowance now claimed formed a part of their personal benefits; consequently, were embraced in the decision as forming a portion of their interests in the stipulations of the treaty. It was upon that question the agreement and accompanying evidence, explanatory of the 12th article, were submitted; it was upon that question his opinion was asked and obtained. He did not base his decision in favor of the allowance upon any expectation that the North Carolina Indians would remove west with the tribe, because, in the agreement before him, on which the decision was based, it was stated that, by the terms of the treaty, if they would become subject to the laws of the State, they had the right to remain and become citizens; which they intended to do, and to purchase lands for a permanent residence. This construction of the treaty is further fortified by the subsequent practice that was established under it by the War Department, which was sanctioned by the accounting officers of the treasury, and by two boards of commissioners, acting under appointments from the President, as provided under the 17th article, whose decisions, by the terms of the treaty, were to be final. Under their decisions, the Cherokees now remaining in the State of Georgia were

paid the same allowance as that now claimed for those remaining in the States of Alabama, Tennessee, and North Carolina. In opposition to this construction of the treaty, it is admitted that your predecessor at the head of the office of Indian affairs has proposed a change of construction, so as to make this allowance dependant upon removal west. It is also true that he refused payment on certificates issued by one board of commissioners—General John H. Eaton, ex-Secretary of War, and Edward B. Hubley—on claims of this description, in favor of J. K. Rogers, one of the signers to the treaty. An appeal was made to Congress for the passage of a resolution directing the payment of that and other suspended certificates. The resolution was passed, notwithstanding the great efforts of the Indian office to prevent its passage, and thereby sustain the new construction of the treaty; but the will of Congress was disregarded, and President Tyler vetoed the resolution. At the next session the resolution was returned, with the reasons of the Executive for refusing his assent. The resolution was again renewed, and with its renewal again commenced the efforts of the indefatigable Commissioner of Indian Affairs to defeat its passage. Notwithstanding all his efforts, Congress again passed the resolution by almost a unanimous vote of the Senate, and about two-thirds of the members of the House of Representatives.

In order to prevent the Indian office from again defeating the will of Congress, the resolution was amended so as to repeal so much of the act of 1834, which established the Indian office, as required all claims arising under Indian treaties to be first presented there for payment before paid at the treasury; and instead thereof, the Secretary of the Treasury was required to pay the certificates on presentation, by whom they were paid as required. Thus ended a contest between the Indian office and Congress, which cost the government, to calculate the time consumed in legislation, not less than two hundred thousand dollars, without any advantage whatever, except to test the power of the Indian office to sustain itself against the will of Congress. But since then some new evidence has come before Congress, which might have convinced your predecessor that he was wrong, and that Congress was right upon this question. The Cherokees now west of the Mississippi, the only persons to be in the least affected by the payment to the North Carolina Indians, and those in the other States, have come forward, and, as honest men should do, not only justified the payments which have been made to their brethren remaining in the States, but also justify payment to those that have not yet been paid; and, in order to aid them in obtaining their just rights, have furnished Congress with a strong and conclusive argument in their favor. In their memorial to the 28th Congress, which bears date the 17th of April, 1844, they say: "This claim for removal, we contend, was in each case an *individual claim*; * * because *each individual* who *chose* to *remain a citizen* of the *State* actually became a *creditor* to the *government* for *each member* of his *family* remaining with him. * * * * * * * * It is easily ascertained what *number* of *Cherokees* there were entitled to *transportation* in *kind*, or *commutation* for *removal*. The number of persons of the Cherokee nation, according to the census of 1835, including *whites* and *blacks*, and *North Carolina Indians*, was *sixteen thousand seven hundred and forty-three*. Thus, at $20 per head, the United States would be entitled to a credit for $334,860 for *removal*.

"The same *arguments* which apply to the *data* for *removal*, apply pre-

cisely with the same force to the *data* for *subsistence*. The only difference is, that such as commuted for their own subsistence (as very many did) were entitled to *thirty-three dollars* and *thirty-three cents* for *each person* so subsisted. Upon this basis, therefore, the United States are entitled to a *credit for subsistence* for $558,044 17." (See House doc. No. 234, p. 6.)

I have shown how the parties to the treaty understood it, leaving no doubts as to its having been the understanding on the part of the Indians, as well as the commissioner of the United States at the time the treaty was made to allow those of the tribe who chose to remain east a commutation in money of $53 33 for each member of their families in *lieu* of *removal* and *subsistence* in *kind*; and not only did the Cherokees, at the time the treaty was concluded, so understand it, but even now, after their removal west, they entertain the same opinion. I contend, therefore, that the government, as trustee, being charged with the apportionment among the individuals of the tribe of the proceeds of the sale of the common property, has no right to withhold payment from those east of what is admitted to be a portion of their *dues under the treaty* by all the parties in interest. I contend, further, that the said trustee has no right to construe the treaty contrary to the known *understanding* of the *Indians*, by any rules of interpretation either as existing among civilized or uncivilized nations. Upon this last point, for the purpose of making more clear what would seem to be already indisputable, I will quote a few rules of interpretation, not as being new to you, but believing, in your present position, their reviewal may not be without its advantage:

"1st. In the interpretation of a treaty, or any other deed whatever, the question is, to discover what the *contracting parties have agreed upon*; to determine precisely, on any particular occasion, what has been *promised* and *accepted*; that is to say, not only what *one* of the parties *intended* to promise, but also what the *other* must *candidly* and *reasonably* have supposed to be *promised* to him; what has been sufficiently *declared* to him; and what must have *influenced* his *acceptance*. Every *deed*, therefore, and every *treaty*, must be *interpreted* by certain *fixed rules*, calculated to determine its *meaning* as *naturally understood* by the *parties* concerned at the *time* when the *deed* was *drawn up* and *accepted*.

"2d. When we evidently see what is the *intention* of the *contracting parties*, it is not *allowable* to wrest their *words* to a *contrary meaning*. The *intention*, sufficiently *known*, furnishes the true *matter* of the *convention*—what is *promised* and *accepted*, *demanded* and *granted*. A *violation* of the *treaty* is *rather* a *deviation* from the *intention*, which it sufficiently *manifests*, than from the *terms* in which it is *worded*; for the terms are *nothing* without the *intention*, by which it must be *dictated*." (See Vattel's Laws of Nations, pp. 247—'49.)

3d. The present Chief Justice of the Supreme Court of the United States, (Mr. Taney,) while he was Attorney General, gave an opinion upon the treaty made with the Choctaw Indians, in which he says: "In an *instrument* of this *sort*, made with *such persons* as the *Choctaws*, I do not think that *strict* and *technical* rules of *construction* should be applied to it. It ought to be expounded liberally, according to the intent." (See Attorney General's Opinions, p. 843.)

4th. The Supreme Court of the United States, in their decision in the case of Worcester *vs.* the State of Georgia, say, "The language used in *treaties* with *Indians* ought never to be *construed* to their *prejudice*." "How

right of hunting reserved to them by the treaty of 1791, extends from east to west about one hundred and fifty miles, where it disappears in the valley of the Mississippi. For the most part this mountain is covered with a dense forest of walnut, mulberry, hickory, poplar, dogwood, elm, ash, chestnut, sugar maple, white pine, spruce pine, fir, and cedar trees, with an undergrowth of laurel, ivy, and the sweet shrub, so interwoven amid ravines, cliffs, and precipices, that it is almost inaccessible to any persons except Indians, and a few whites who have become acquainted with the passes in the mountain by hunting and attending to stock. Upon a portion of the summits of the mountain no timber grows, making it to resemble the rich pasturage of a small portion of the prairies of the west, where, instead of timber, grows, both summer and winter, grass and all the varieties of wild flowers. Their cattle subsist all the year without any other expense to their owners, except furnishing them with salt. On the south side of this mountain, which in width extends about thirty miles, rises the Oconaluftа, which, with the Tuckasega river, forms one of the prongs of Tennessee. On that, and their tributary streams, the Qualla town Indians live. On these streams all the lands they purchased are situated; and notwithstanding, after leaving the valley through which these streams flow, the lands are broken and mountainous, they are rich, and seem to be well adapted to all the purposes of grazing. Blue and herdsgrass have been tried, and are found to grow well. The climate is one of the most salubrious in the United States. The country is well supplied with springs of crystal water that issue from the side and base of the mountain. In the mountain streams, trout, and other fish, found in the western waters, are in abundance, and wild fowl and game sufficient to furnish the sportsman with amusement. Here, in the land occupied by those Indians and their ancestors from time immemorial, where the sacred relics and the graves of their ancestors are distinguished by the monuments of rude piles of stone, those Cherokees yet delight to dwell. Regarding themselves as permanently settled, under the protection of the laws of North Carolina, provision having been made for the removal of such individuals as might become dissatisfied with the country east, and desired again to pursue the hunter life in the west, they did not expect or desire any more to be annoyed with enrolling agents; and, in anticipation of remaining permanently as a community on the lands they had purchased, and only occupy the lands which might be assigned them west as they chose to go, they have felled the timber, cleared fields, built good fences, have planted orchards, and made, in most instances, comfortable hewed log-houses to live in. Their females are no longer treated as slaves, but as equals. Their employment like that of the wives of most of the pioneers, is principally confined to domestic pursuits. While the men are ploughing in the field, they are spinning, weaving, &c., manufacturing clothing and preparing food for their families. They have domestic animals such as are usually found among the whites—horses, cattle, hogs, sheep, &c. They cultivate Indian corn, wheat, rye, oats, beans, peas, Irish and sweet potatoes, cabbage, turnips, &c.; and they not only raise a plenty for themselves, but make a surplus which they sell to the whites engaged in working gold mines adjacent to the Indian settlement. They have acquired a knowledge of most of the mechanic arts known by their white neighbors, and not only do their own blacksmithing, stocking of guns, and coopering, but do much work of that description for the whites. They have become the most temperate people in the State, under the influ-

ence of a temperance society. They have learned to read the New Testament in their own language, which was translated by the unfortunate Boudinot, who was murdered in the Cherokee country west by the hands of assassins. They have their own preachers, who labor with their hands during the week, and preach and teach the children how to read and write on the Sabbath, and near one-fourth of the entire population understand these branches of education. Few settlements of the whites, in any of the States, can claim that a greater proportion of their population can read and write. In ten years, it appears by the certificate of the clerk, the grand jury of the county in which Qualla town is situated have not found a single indictment against any of the Indians. They have during that time performed public duty; worked on, and kept up the public roads which lead through their settlement. By the constitution and laws of the State they have the right to vote, but exercise it but seldom, lest they should be regarded as identified with one of the political parties, and thereby give offence to the other. Would not any reasonable man prefer residing in this the Indian's paradise east, to the country west. The improvement is in part owing to the effect of the temperance society, which removes the principal cause of so many tribes becoming extinct, and being adjacent to the whites, who heretofore have been their superiors in the arts. The portion of the tribe west, surrounded as they are by tribes less advanced in civilization, must, as a consequence, retrograde to a level with them, even if peace be restored. Instead, therefore, of doing anything to check the improvement of the Cherokees east, the government should encourage it, and furnish the aid promised to them by President Jefferson in 1809. By doing so, a system, which has been devised for their improvement, will stand the test of experience; and if successful in civilizing and christianizing these Indians, may it not be adopted by the government to civilize and christianize all the tribes under her guardian care, and thus preserve from extermination about three millions of the aborigines of this country? Is this not an object worthy of a great and magnanimous nation; and would not all christendom rejoice in the accomplishment of an object so desirable to every Christian and philanthropist?

Give the experiment a fair test, and then, if it don't succeed, and the Indians cease to improve and fall back into dissipation, those who ask this to be done will, if a country be laid off for them west, having superior advantages to the one they now live in, be ready to aid their removal to it, and use for the accomplishment of that object all the influence they may have. There is one advantage in adopting this plan, which, I presume, will not fully be understood by many persons unacquainted with Indian customs; that is, the system proposed not only with that tribe, but all others. As fast as a portion of the tribe become qualified to make useful citizens, include them in the family of American freemen, with equal rights and privileges, and leave them undisturbed. By this means, while the remainder of the tribe who are not qualified to become citizens must continue to remove in advance of the white population, they will carry with them, to whatever country in the far west they may be required to go, a recollection of their kindred and friends left in the land of their fathers, who have become merged in the population of the United States with the emigrants from every nation. The kind efforts of the government and religious societies to civilize the Indians will have an influence upon their happiness

unknown to the former system; and more will be done by it to preserve peace on the frontiers than is usually accomplished by the large appropriations which are made for suppressing and preventing Indian hostilities. This being done, and by abandoning the practice of coercing Indians to remove, which has already cost the government more than fifty millions of dollars, the Indians on the frontier will always be the friends instead of the enemies of the government, which may prove of much advantage to us in time of war with any powerful nation.

With the highest respect, your obedient servant,

W. H. THOMAS.

Hon. WM. MEDILL,
Commissioner of Indian Affairs.

MARCH 28, 1846.

ATHENS, TENN., *January* 11, 1839.

Whereas the Cherokees belonging to Oochella's band, in consequence of their meritorious services rendered the United States in assisting to capture the murderers of the two soldiers belonging to the 4th infantry, United States army, have been, by Colonel William S. Foster, commanding the United States troops in the Cherokee nation, in pursuance of instructions from General Winfield Scott, commanding eastern division United States army, permitted to remain in North Carolina, and to unite with the Oconalufta Indians; and whereas their crops and property of every description was, during last spring and summer, sold by agents appointed for that purpose, leaving them destitute of the means of subsistence, as well as working tools, &c.: the undersigned, therefore, adjudge them entitled to receive the money arising from the sale of their property, and all moneys due them under the provisions of the treaty of 29th December, 1835.

TH. W. WILSON,
JAMES LIDDELL,
Commissioners.

JOHN C. MULLAY,
Secretary to the U. S. Commissioners.

CHEROKEE AGENCY EAST,
February 28, 1838.

SIR: I have ascertained that there are in the Cherokee nation east about two hundred very old and infirm Indians, among whom are some lame, blind, &c., who believe themselves unable to remove west with the tribe, and wish to be permitted to remain, purchase land, settle, and reside in one neighborhood during their lives. Some of them wish that one or two of their young relatives may be suffered to remain with them.

I respectfully suggest to the department the propriety of granting these aged persons their request, as they in the course of nature cannot long re-

main here, and the young persons will emigrate as soon as their relatives die.

Very respectfully, your most obedient servant,

NAT. SMITH,
Superintendent Cherokee removals.

Hon. A. HARRIS,
Commissioner of Indian Affairs.

A true copy from the original.

T. R. CRUTTENDEN,
Clerk Indian Office.

OFFICE OF INDIAN AFFAIRS,
March 24, 1838.

SIR: I have the honor to acknowledge the receipt of your letter of the 28th ultimo.

I have submitted the proposition in respect to the 200 old and infirm Cherokees being permitted to remain and become citizens, to the Secretary of War, and am directed to state, in reply, that no law forbidding such a course is known to this department; that if they wish to remain and are willing to submit to the State laws, and are able to purchase land, it is presumed that no objection would be made in any quarter to their doing so.

* * * * * * * *

Very, &c.,

C. A. HARRIS
Commissioner.

General N. SMITH,
Calhoun, Tennessee.

June 19, 1839.—A true copy:

T. R. CRUTTENDEN,
Clerk Indian Office.

MEMORIAL OF THE CHEROKEE INDIANS OF QUALLA TOWN, N. C.

To the commissioners and committee appointed to carry into effect the late treaty with the Cherokees of December 29th, 1835.

The undersigned memorialists, Cherokee Indians, respectfully represent to your honorable body that they are averse to removal to the Cherokee country west of the Mississippi; desire to continue citizens of, and subject to the laws of the State of North Carolina, where they reside; for which privileges they, as in duty bound, will ever pray. 6th April, 1837.

	Number in family.		Number in family.
Younaguska,	9	Tiyahah,	4
Long Blanket,	3	Siula, or Weaver,	7
Will-nota,	7	Tutlesta,	4
John Sonih,	6	Flying Squirrel,	5
Tom Canought,	6	Ooh-sowih,	4

	Number in family.		Number in family.
Cottutta,	8	Charley,	9
Aroneach,	6	Arche,	3
Tarapin, or Culasowah,	5	Chunowhinka,	4
Nickojack,	9	Skekih,	4
Ooh Sowih,	6	Ahquottaga,	3
Chuheluh, or Fox,	6	Tutlestah,	3
Tetonneeska,	7	Tekinnih Soeeka,	7
Che-ye-nana,	7	Chinoque,	3
Little Jake,	6	Stekoih,	8
Ula-na-hih,	5	Kahuhih,	8
Waggula,	2	Tickoneeska,	8
Co-ult,	6	Scitta, or Connala,	6
Culasutta,	4	John Wayne,	7
Oh-la-yo-hih,	3	Tiyunohella,	11
Wallis,	5	Tutlestah, his son,	4
Sicatowih,	6	Tuniih,	4
Chigasutta,	8	Yonachuheyuh,	5
Big Jack,	4	Wah-he-yuh-ca-gees-ka,	4
John Davidson,	2	Nancy and family,	6
Chugoltoih,	6	Sanders, (an orphan,)	1
Ca-ne-tutuh,	5	Standing Wolf,	9
Tutlestah,	8	Lowen,	3
Iyentuga,	8	Little George,	5
Little John,	6	Tiniih Sicatowih	8
Old Jake, or Chugoltoih,	5	Tohead,	5
Total - - - - - - - - - - - -			333

State of North Carolina, Haywood county.

I, William Welch, of said county, on the attached certificate of citizens of this county, recommend the Cherokee Indians whose names appear on the attached memorial for the privileges therein requested. 22d of June, 1837.

WM. WELCH.

New Echota, September 30th, 1837.—The within memorial was taken up, considered and admitted.

JOHNSON ROGERS,
President pro tem. of the committee.

LOVELY ROGERS,
Clerk to the committee.

—

COMMISSIONER'S OFFICE,
Athens, Tenn., December 5, 1838.

So far as we have authority under the late treaty, we approve of the above decision of the committee.

JAMES LIDDELL,
THOS. W. WILSON,
Commissioner.

JNO. C. MULLAY, *Secretary.*

CHEROKEE AGENCY EAST,
Office Supt. of Cherokee removals, Dec. 13, 1838.

I hereby certify that the Cherokees whose names appear on the foregoing memorial, belonging to the Qualla Town, situated in North Carolina, who were on the 13th of September, 1837, allowed citizenship by the Cherokee committee, and approved of by the United States commissioners on the 5th of December, 1838, acting under the authority of the 12th article of the Cherokee treaty of 29th December, 1835, were included in the last census of the Cherokee nation east, referred to in the provisions of the 15th article of said treaty, as appears on the census taken by the authority of the United States, and now on file in this office.

For General Nathaniel Smith, superintendent of Cherokee removals.

J. N. HETZEL, *Clerk.*

COMMISSIONERS' OFFICE,
Athens, Tenn., Decenber 15, 1838.

Whereas it appears from the above certificate that the Cherokees residing in Qualla Town, North Carolina, are included in the census just completed, at the date of the treaty of 29th December, 1835, we are therefore of opinion that, agreeably to the provisions or the 15th article of the said treaty, they are entitled to a share of the per capita in proportion to their numbers.

JAMES LIDDELL,
THOMAS W. WILSON,
Commissioners.

JNO. C. MULLAY,
Secretary to Commissioners.

State of North Carolina.

The undersigned, citizens of the county of Haywood, hereby certify we have been acquainted with and lived neighbors to the Cherokee Indians whose names appear on the memorial attached, for a number of years; believe them fast improving in civilization, knowledge of the arts, and agriculture; for sobriety not surpassed by the same number of whites in any part of the State; qualified to make useful citizens; have heretofore lived in peace and friendship with the whites. 6th day of April, 1837.

Joseph Keener,	Alexander Crisp,
Henry Plemons,	Jas. J. Cockerham,
James Nations,	Scroop Enloe.
Thos. L. Gaston,	Nathan Hyatt,
George W. Hice,	Samuel Sherrill, senr.
William Sitton,	Samuel Sherrill, jr.
B. M. Enloe,	John Dillard,
Green Felmoth,	J. B. Sherrill,
A. R. Sawyer,	Samuel Gibson,
George Sherrill,	Joseph Stillwell,

Michael Francis,
S. W. Gibson,
E. G. Hyatt,
Samuel Thompson,
Hiram Rich,
Henry Carter,
George W. Hayes,
J. W. King,
John Gibson,
B. Hyde,
Isaac P. Harris.

State of North Carolina, Haywood county.

The court of pleas and quarter sessions held for said county, upon the attached certificate and our own knowledge, recommend the Cherokee Indians whose names appear on the attached memorial for the privileges therein requested. In testimony whereof, we have ordered the clerk's certificate to be hereunto affixed, 22d June, 1837.

F. McGEE, [SEAL.]
JOS. KEENER, [SEAL.]
S. E. BYERS, [SEAL.]

State of North Carolina, Haywood County.

I, William Welch, clerk of the court of pleas and quarter session held for said county, do hereby certify that at June term, 1837, in [L. S.] open court, the attached memorial and certificate were read and examined by court, and the above order made out, to which is affixed my seal of office in accordance therewith certified. 22d June, 1837.

WM. WELCH, *Clerk.*

STATE OF NORTH CAROLINA, *Haywood County.*

SUPERIOR COURT OFFICE.

I, William Johnston, clerk of the superior court of law in and for the county of Haywood aforesaid, do certify, that on examinations of the records it does not appear that any Indian residing in this State has been indicted in this court for the last ten years, during which time I have been the acting clerk of said court; and that *Qualla Town*, where a majority of the Cherokee Indians in this State are said to reside, is situated in this county. In testimony whereof, I have hereunto set my hand, and affixed the [L. S.] seal of the court at office, this 12th day of October, A. D. 1843.

WM. JOHNSTON, *Clerk.*

I am well acquainted with Wm. Johnston, whose name is subscribed above, and he is a man of character, and his reputation is good, and very good.

JAMES GRAHAM.

MAY 26, 1846.

The undersigned, having had considerable acquaintance with the Qualla Town Cherokee Indians for the last two years, takes pleasure in saying that he believes them to be a sober, temperate and industrious people, making considerable improvement in the domestic arts, and advancing

in civilization; that a number of them are also a pious and religious people, and worthy of much respect and confidence.

E. F. SEVIER,
P. E., of Ashville district.
DAVID RING,
Missionary.

ECHOTA, *August* 22, 1843.

The undersigned, citizens of the counties of Haywood and Macon, and State of North Carolina, hereby certify that we have lived neighbors to the Qualla Town Cherokee Indians since 1838; we consider them fast improving in the knowledge of the arts and agriculture. As an evidence of the latter, they have not only raised a support for themselves, but during the past summer sold a considerable quantity to the whites, without which many of the white citizens would have been compelled to procure corn from a considerable distance. As a community they are temperate and industrious, and make useful citizens. They aid the whites in working the public roads that lead through their town. A large number of them have embraced the Christian religion, and are regarded as orderly members of the Baptist and Methodist societies. They have their own preachers, who, though they do not understand the English language, show by lives of piety and virtue that they, too, have embraced the true principles of the Christian religion, and are zealous to propagate them among their people. With a few exceptions, they belong to a temperance society formed many years ago on the Washingtonian plan. It is common for them to have public meetings, at which nearly all the men of the town assemble without any intoxicating drink, and without a single individual in the least degree being under the influence of spirits.

AUGUST 17, 1842.

Joseph Welch	J. W. Gibbs
Geo. N. Hughes	J. Stilwell
Christopher Nations	D. G. Bryson
M. Coleman	John Turpin
A. T. Enloe	Henry F. Beck
W. W. Enloe	A. M. Mingus
S. W. Dowdle	B. P. Turner
J. M. Campbell	Wm. A. Coleman
Woody Russell	T. Bird
William Martin	Urial Cooper
Solomon Messer	A. Herren
Elias Carroll	David Adams
James F. Enloe	H. P. Adams
J. B. Sherrill	A. P. Adams
John Gipson	J. P. Sherrill
W. J. Sherrill	Robt. Collins
Wm. Russell	John Nations
Samuel Conly	George Hefley
G. M. Cooper	John Cornnet
John Sherrill	James Coe
William A. Ferrington	J. M. Battle

J. T. Penland	C. F. Eitel
J. S. Gibson	Samuel Gipson
G. C. Martin	Isaac Gipson
H. Martin	Ute Sherrill
A. T. Hyatt	Benj. Sherrill
A. N. Cockerham	Eb. Newton
George Sherrill	Samuel Gibson
B. M. Enloe	Watson Battle
C. Mingus	Andrew Welch
C. B. Mingus	I. P. Harriss
J. D. Sherrill	J. Keener
Jno. Mingus	Henry Hardin
Samuel Sherrill	J. B. Carrell
J. H. Hunter	Allen Fisher
James H. Turpin	Joseph Buchanan
H. Battle	Jesse Ashe
W. M. Enloe	John Stiles
Scroop Enloe	Wm. Davis
J. W. Hughs	Israel Robison

I am acquainted with a number of the persons whose names are signed to this paper, and those whom I do know on the list have a good character.

JAMES GRAHAM.

Having, at the request of W. H. Thomas, esq., examined the list of names subscribed to the within paper, and being personally acquainted with a large number of the individuals whose names are subscribed, I can testify that they are generally men of respectability, and entitled to credit at home.

T. L. CLINGMAN.

OCTOBER 5, 1843.

QUALLA TOWN, IN NORTH CAROLINA.

The aggregate number was 669 in 1840, agreeably to the census of the Cherokees east, who, with a few exceptions, were full-blooded Cherokees. In the fall of 1844, a period of four years, the following information was obtained for the War Department. In the period of four years the total number of deaths, including those among the old and infirm who were permitted to remain east in consequence of their being unable to remove west, amounted to 53. The number of births in the same period was 166; which shows an increase of 113 upon the population of 669; making, as the aggregate number of the town, in the fall of 1844, 782, besides the remnant of the Catawba tribe now residing with them, not included in the estimate, which would increase the number to upwards of 800.

This information was desired by the Secretary of War, Hon. William Wilkins, to enable him to adopt measures to improve the condition of the North American Indians—who are now estimated by the Baptist Home Missionary Society at about 3,000,000—and thus prevent them from becoming extinct. Few men probably ever presided over that department more friendly to the Indians. It shows the state of improvement at the time the information was obtained, in the fall of 1844, as required by the questions propounded:

Total number of blind, including one caused by old age			2
Do	do	deaf and dumb	3
Do	do	idiots and insane persons	0
Do	do	persons engaged in agriculture	259
Do	do	blacksmiths gun and silver smiths	13
Do	do	coopers who make pails, barrels, &c.	35
Do	do	persons who make looms and spinning wheels	17
Do	do	men who perform public duty by working upon public roads which lead through their town	172
Do	do	females who have learned to card, spin, weave, and make their clothing	206
Do	do	males and females belonging to the temperance society	310
Do	do	Sabbath school teachers and scholars, all Cherokees	103
Do	do	males and females who have learned to read and write without the aid of any schools, except those kept by the chiefs upon the Sabbath	159

[Nearly one-fourth of the entire population can read and write.]

Total number of capital offences committed from 1840 to 1844			0
Do	do	assaults and batteries	0
Do	do	habitual and confirmed drunkards	0

Game killed by them in the year 1844, 540 deer, 78 bears, 18 wolves, 2 panthers.

The plan adopted for the civilization of these Indians is different from any other adopted in the United States. Their customs and amusements are not interfered with, except so far as they are found to have an immoral tendency. W. H. T.

Resolutions relating to the Cherokee Indians residing in North Carolina.

Resolved, That our Senators and Representatives in the Congress of the United States are hereby requested to use their influence in favor of obtaining a speedy settlement of the just claims of the Cherokee Indians residing in this State, belonging to the towns of Qualla and Buffalo, and of

all other Indians who may demean themselves as peaceable and orderly citizens.

Resolved, further, That his excellency, the governor, be requested to send a copy of the foregoing resolution to our Senators and Representatives in Congress.

Read three times in general assembly, and ratified 9th January, 1845.

EDW. STANLY,
Speaker of the House of Commons.
BURGESS S. GAITHER,
Speaker of the Senate.

STATE OF NORTH CAROLINA,
Office of Secretary of State.

I, William Hill, secretary of state in and for the State of North Carolina, do hereby certify that the above is a true copy of resolutions passed at the last general assembly.

Given under my hand, this 14th day of January, 1845

W. HILL, *Secretary.*

MESSAGE

OF

THE PRESIDENT OF THE UNITED STATES,

RELATIVE TO

The internal feuds among the Cherokees.

APRIL 13, 1846.

Read, referred to the Committee on Indian Affairs, and ordered to be printed

To the Senate and House of Representatives:

In my annual message of the 2d of December last, it was stated that serious difficulties of long standing continued to distract the several parties into which the Cherokee tribe of Indians is unhappily divided; that all the efforts of the government to adjust these difficulties had proved to be unsuccessful, and would probably remain so, without the aid of further legislation by Congress. Subsequent events have confirmed this opinion.

I communicate herewith, for the information of Congress, a report of the Secretary of War, transmitting a report of the Commissioner of Indian Affairs, with accompanying documents; together with memorials which have been received from the several bands, or parties, of the Cherokees themselves. It will be perceived that internal feuds still exist, which call for the prompt intervention of the government of the United States.

Since the meeting of Congress, several unprovoked murders have been committed by the stronger upon the weaker party of the tribe, which will probably remain unpunished by the Indian authorities, and there is reason to apprehend that similar outrages will continue to be perpetrated, unless restrained by the authorities of the United States.

Many of the weaker party have been compelled to seek refuge beyond the limits of the Indian country, and within the State of Arkansas, and are destitute of the means for their daily subsistence. The military forces of the United States stationed on the western frontier have been active in their exertions to suppress these outrages, and to execute the treaty of 1835, by which it is stipulated that "the United States agree to protect the Cherokee nation from domestic strife and foreign enemies, and against intestine wars between the several tribes."

These exertions of the army have proved to a great extent unavailing for the reasons stated in the accompanying documents, including communications from the officer commanding at Fort Gibson.

I submit for the consideration of Congress, the propriety of making such amendments of the laws regulating intercourse with the Indian tribes as will subject to trial and punishment, in the courts of the United

States, all Indians guilty of murder, and such other felonies as may be designated, when committed on other Indians within the jurisdiction of the United States.

Such a modification of the existing laws is suggested, because, if offenders against the laws of humanity in the Indian country are left to be punished by Indian laws, they will generally, if not always, be permitted to escape with impunity. This has been the case in repeated instances among the Cherokees. For years, unprovoked murders have been committed, and yet no effort has been made to bring the offenders to punishment. Should this state of things continue, it is not difficult to foresee that the weaker party will be finally destroyed. As the guardian of the Indian tribes, the government of the United States is bound, by every consideration of duty and humanity, to interpose to prevent such a disaster.

From the examination which I have made into the actual state of things in the Cherokee nation, I am satisfied that there is no probability that the different bands or parties into which it is divided can ever again live together in peace and harmony, and that the well-being of the whole requires that they should be separated and live under separate governments, as distinct tribes.

That portion who emigrated to the west of the Mississippi prior to the year 1819, commonly called the "Old Settlers," and that portion who made the treaty of 1835, known as the "Treaty party," it is believed would willingly unite, and could live together in harmony. The number of these, as nearly as can be estimated, is about one-third of the tribe. The whole number of all the bands or parties does not probably exceed twenty thousand. The country which they occupy embraces seven millions of acres of land, with the privilege of an outlet to the western limits of the United States. This country is susceptible of division, and is large enough for all.

I submit to Congress the propriety of either dividing the country which they at present occupy, or of providing by law a new home for the one or the other of the bands or parties now in hostile array against each other, as the most effectual, if not the only means of preserving the weaker party from massacre and total extermination. Should Congress favor the division of the country, as suggested, and the separation of the Cherokees into two distinct tribes, justice will require that the annuities and funds belonging to the whole, now held in trust for them, should be equitably distributed among the parties, according to their respective claims and numbers.

There is still a small number of the Cherokee tribe remaining within the State of North Carolina, who, according to the stipulations of the treaty of 1835, should have emigrated with their brethren to the west of the Mississippi. It is desirable that they should be removed; and, in the event of a division of the country in the west, or of a new home being provided for a portion of the tribe, that they be permitted to join either party, as they may prefer, and be incorporated with them.

I submit the whole subject to Congress, that such legislative measures may be adopted as will be just to all the parties or bands of the tribe. Such measures, I am satisfied, are the only means of arresting the horrid and inhuman massacres which have marked the history of the Cherokees for the last few years, and especially for the last few months.

The Cherokees have been regarded as among the most enlightened of the Indian tribes; but experience has proved that they have not yet advanced to such a state of civization as to dispense with the guardian care and control of the government of the United States.

JAMES K. POLK.

WASHINGTON, *April* 13, 1846.

WAR DEPARTMENT, *Washington, April* 11, 1846.

SIR: I herewith transmit the report of the Commissioner of Indian Affairs, with various documents relating to the difficulties among the Cherokees, and to the claims of the several parties into which that tribe is unhappily divided. I approve of the views presented in the Commissioner's report, and the measures therein suggested for restoring quiet and preventing future strife among them, and respectfully recommend them to your favorable consideration.

Very respectfully, your obedient servant,

W. L. MARCY.

To the PRESIDENT OF THE UNITED STATES.

WAR DEPARTMENT,
Office Indian Affairs, March 31, 1846.

SIR: I have the honor to submit the following report upon several memorials of different parties of Cherokees, which have been referred to this office,

The Cherokee Indians are divided into three parties or factions, each now memorializing the government. The first, styled the "western Cherokees," or "Old Settlers," west of the Mississippi, are those who, many years ago, separated from the tribe east of that river. They contend that they are a separate and independent community from those who remained east till their removal under the New Echota treaty of eighteen hundred and thirty-five; and that, as such, they are rightfully the exclusive owners of the tract of country now occupied by the whole tribe in common, except the eight hundred thousand acres added to it by that treaty. They, therefore, claim compensation for so much of that country as may be necessary for the accommodation of those who removed under the treaty in question. They also represent the government of the majority, composed of those who adopt the views of John Ross, to be oppressive and unjust, and they wish, therefore, to be separated from that party, in order to enjoy a peaceful government of their own.

This claim of the western Cherokees has heretofore been rejected, but, it is believed, on grounds of government policy rather than of legal right.

In the decision upon the claim, those people were regarded as only contingently independent during their separation from the eastern Cherokees. That separation was not considered final, because the established policy of the United States was to remove the whole tribe—a policy enjoined by obligation to the States in which they were, to extinguish the Indian title to lands within their limits; that "there was no restriction upon emigration from the east," and the evident object of the government was to en-

courage it. The treaty of eighteen hundred and twenty-eight put an end to all possible question upon the subject, if it did not furnish the proper construction of all that had previously been done. The preamble recites, that it was "the anxious desire of the government of the United States to secure to the Cherokee nation of Indians, as well those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States east of the Mississippi river, and who may wish to join their brethren of the west, a permanent home," &c. This was regarded as explicit, and if it were not, "it would seem there could be no doubt of the intention; for the seven million acres would give to every Cherokee west, (reckoning them at six thousand,) man, woman, and child, near twelve hundred acres of land, which would be preposterous." It was considered that "if there had been no prior recognition of the purposes for which this land was appropriated, it might be contended, with some show of plausibility, that the treaty of eighteen hundred and thirty-five was made with the eastern Cherokees, and that they and the United States could not impair the rights of those west; but there was a full acknowledgment of the general right in the treaty of eighteen hundred and twenty-eight, which does not requi.e the aid of the admissions of James Rogers and John Smith, delegates from the western Cherokees, appended to the treaty of eighteen hundred and thirty-five." Any such question, however, was regarded as having been put to rest by the adoption of the Act of Union between the parties, on the 26th June, 1840, which fully united the western and the eastern Cherokees, and made any separate interest common to all. The western Cherokees contest this decision in the following manner:

At an early period the Cherokees became divided as to their future policy. One party preferred concentrating themselves and cultivating the pursuits of civilized life, under a regular government and fixed laws; while the rest of the tribe desired to remain in the aboriginal or hunter state, which was most congenial to their feelings. Many had already removed to a country west of the Mississippi, more abounding in game, and others were disposed to follow; when, in eighteen hundred and seventeen and nineteen, treaties were made with all the parties, by which those west, and those who proposed to join them, relinquished all their interest in the lands east, and surrendered their proportion of them to the United States; receiving, in exchange, acre for acre, about four million acres of land lying within the limits of the present State of Arkansas; in addition to which, under a promise of the President, made in March, 1818, and recognized and renewed by the Secretary of War, in October, 1821, they were to have the use of the lands immediately west for the purpose of a perpetual outlet in that direction as far as the jurisdiction of the United States extended. An equitable division was also made in the moneyed interests that had been enjoyed in common, so as to give to each party a share proportioned to their numbers respectively. This, it is contended, was a complete and perfect separation, leaving either party no right or interest whatever to be enjoyed in common. In a few years the progress of the white settlements rendered it important to obtain from the western Cherokees the lands granted them by the treaties of 1817 and 1819. The welfare of the Indians also required that they should remove further west in order to be free from the harassments and evil effects of being closely surrounded by a white population. Hence the treaty with them of 1828,

by which they agreed to give up the lands referred to, and on which they had made valuable improvements, and to retire further west upon those to the occupancy of which they were, in fact, already entitled, for the purposes of an outlet. This treaty was made with the "Cherokee Indians west of the Mississippi," without any connexion or consultation with the Cherokees east. It gave them, in fee simple, seven million acres of land, and guarantied to them the use of the lands immediately west for the purpose of a perpetual outlet, as promised by the President and Secretary of War. It also provided that "when they may wish to lay off their lands and own them individually, a surveyor shall be sent to make the surveys at the cost of the United States." This treaty contains various other stipulations, in all of which the western Cherokees are recognised as a nation, separate and distinct from those east. The only reference to the latter is an agreement to receive such of them *as may wish or be induced to emigrate*. It was well known, however, that the eastern Cherokees were entirely averse to emigration. They discouraged it by every means in their power, and passed severe penal laws (some of them inflicting death) for the punishment of any persons who should endeavor to effect any further exchange of lands with the whites. The object of the western Cherokees, in making provision for the reception of emigrants from the east, was simply that they might somewhat strengthen themselves and increase their importance, at a time when they would be surrounded with wild tribes, from whom they had to expect aggressions and difficulties. They never expected the precipitation of the whole body of eastern Cherokees upon them, to take possession of their lands, subvert their government, subject them to another in which they had no share; and, in fact, render them strangers in their own country, as has been the case. After the treaty of 1828, the emigration was greater than could have been expected—caused by the strenuous efforts of the government to that end. They considered it unjust that such considerable numbers should come and share their annuities, and take possession of their lands, without compensation; and, therefore, early in 1832, they applied for an increase in their annuity, in proportion to the number of emigrants, and also for an extension in the quantity of land granted them in fee simple to the same extent; such an extension having been promised by the United States in the negotiation of the treaty of 1828. Delegates of the eastern Cherokees, then in Washington, objected to anything of the kind which would affect their interests, on the ground that they were not parties to, and had nothing to do with the treaty of 1828, and the system of emigration had been adopted without their consent and contrary to the wishes of the eastern Cherokees.

Some of the lands previously ceded to the Creek Indians having been included in the cession made to the western Cherokees by the treaty of 1828, a treaty supplementary to that of 1828 was made with them in February, 1833, as "the Cherokee nation of Indians west of the Mississippi river," for the purpose of readjusting the boundaries of their lands, and for other purposes. This treaty guarantied to them, forever, the lands claimed, and also the "perpetual outlet west, and a free and unmolested use of all the country lying west of the said seven millions of acres (the country granted in fee simple) as far as the jurisdiction of the United States extends;" and it provided that "letters patent should be issued by the United States, as soon as practicable, for the land hereby guaran-

tied." Thus, had they chosen, they could, under the provisions of the treaty of 1828, have had their lands divided, and owned them individually, and they could not then have been dispossessed of any portion of them without an invasion of individual right; and, under the treaty of 1833, they were entitled to a patent, vesting in them as a community the exclusive ownership of the land claimed—separate and wholly distinct from and independent of the eastern Cherokees. If, as has been contended, this was not the case, and their possessions and interests were only joint with those of the eastern Cherokees, they had a right to participate in the making of the treaty of 1835, and to share equally in all its benefits. They were not allowed to participate in the making of that treaty, nor have they an equal share in its provisions. Nor did they assent to it, as alleged, after it was made. It was well known that they were opposed to its intended provisions. They sent a delegation to look to their interests in the negotiation; but it was apprehended that their presence might interfere therewith, and means were sought to eject them from the country in order to prevent any such interference. The War Department informed the commissioner who negotiated the treaty, that the delegates of the western Cherokees "must not, under any circumstances, be admitted to the council, or recognised in any manner." He was told that their interference was "unauthorized and officious," and requested, by the exercise of every proper means, to counteract every effort they might make out of the council to obstruct the progress of the treaty. It is true that two western Cherokees did sign and express their agreement to it in behalf of those people; but one of them, James Rogers, was not a delegate, and the other, John Smith, though a delegate, signed it, not only without authority, but contrary to instructions. But even had these two persons authority for what they did, they inserted the express stipulation that it "shall not affect any claims of the western Cherokees on the United States."

In regard to the act of union, those who signed it were not selected by the people for that purpose, and had no authority to act for them; but, if they had, they signed it upon the express understanding that it was not to be binding unless ratified by the people; that the western Cherokees were to be proportionably represented in the government; that neither John Ross nor William S. Coody was to be a member thereof; that they were to receive, each, seventy dollars or upwards of the money to be distributed under the treaty of 1835, as per capita, and to have an equal interest in the lands east of the Mississippi, still claimed by the eastern Cherokees. The act of union has never been ratified by the people; they are not represented in the government; Ross and Coody are leading and controlling members of it; there will be nothing left to distribute, as per capita money, to any one; and, according to the government's construction of the treaty of 1835, the eastern Cherokees have no longer any title to the lands east. The act of union is, therefore, of no binding force or effect.

On the foregoing, supported by lengthened arguments and many subordinate facts, the western Cherokees base their claim.

The statements of fact made by the western Cherokees appear, in the main, to be correct. It seems clear that, after the treaties of 1817 and '19, the western Cherokees retained no title or interest in the lands east, and that the eastern Cherokees had none whatever to the lands west—they having been given to the people west for their proportion of the lands east,

acre for acre. Thus, under the treaties mentioned, those people were the sole and exclusive owners of about 4,000,000 acres of land lying within the present limits of Arkansas, and the treaty of 1828, made with them alone as a separate and distinct nation, recognised theirs as the only title to those lands. For these same lands the United States, by the second article of that treaty, stipulated to possess them, "and to guaranty it to them, forever, and that guaranty is hereby solemnly pledged, of seven millions of acres of land, to be bounded," &c.; and that, "in addition to the seven millions of acres thus provided for and bounded, the United States further guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above described limits, as far west as the sovereignty of the United States and their right of soil extend." By the fifth article it was further agreed, "that the United States, in consideration of the inconvenience and trouble attending the removal, and on account of the reduced value of a great portion of the land herein ceded to the Cherokees, as compared with those in Arkansas *which were made theirs by the treaty of* 1817, *and convention of* 1819, will pay to the Cherokees, immediately after their removal, the sum of fifty thousand dollars." Thus, it would appear, that for about four million two hundred thousand acres of land in Arkansas, the United States gave to the western Cherokees seven millions of less value further west, (to the use of which they were already entitled for the purpose of an outlet,) and a portion of the sum of fifty thousand dollars. It is of these seven millions of acres of land which are now held by the whole Cherokee people in common, that the western Cherokee claims to be exclusive and rightful owners.

The preamble to the treaty of 1828, which has been relied upon to prove that the country thus assigned to the western Cherokees was intended and set apart as the final and common home of all the Cherokees, states it to be "the anxious desire of the United States to secure to the Cherokee nation of Indians, as well those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States east of the Mississippi, and who may wish to join their brothers of the west, a permanent home," &c. By the eighth article, it is stipulated that the western Cherokees, "having, by this agreement, freed themselves from the harassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and their posterity, under the solemn sanction of the guaranty of the United States, as contained in this agreement, a large extent of unembarrassed country," they agree to receive such of their brothers yet remaining in the States as "*may be* induced to join them, and enjoy the repose and blessings of such a state in future." These are the only stipulations committing the western Cherokees to receive emigrants from the east; and they bind them to admit only those *who may wish to emigrate or may be induced to join them.* But so entirely adverse were the eastern Cherokees to emigration, there could have been no well-founded expectation that more than a very limited number could, without some material change of circumstances, be induced to go west; and had it not been for the legislation of the State of Georgia, (which was expected to be followed by similar legislation on the part of the other States in which the eastern Cherokees were,) denationalizing, and extending her laws over them; disposing of her fee simple title to their lands to whites, who dispossessed them, and otherwise

rendering their situation humilitating and distressing, it is not probable that, to this day, any considerable number would have wished or have been willing to emigrate. Those who most strongly advocated the treaty of 1835, were among the most strenuous opponents of emigration, until they became convinced that they could no longer remain where they were, in happiness or prosperity, because of the legislation of the States. These, comprising the treaty party, then desired to join their brethren; but the Ross party did not wish to emigrate, and would not eventually have gone, had they not been compelled to do so by military force. They, at least, were not of the class which the treaty of 1828 bound the western Cherokees to receive.

The treaty of 1833 was, as stated, for the purpose of adjusting the boundary between the possessions of the Cherokee and Creek Indians west. It was made with the "Cherokee nation of Indians west of the Mississippi river," and by it the United States stipulated to possess them, "and to guaranty it to them forever, and that guaranty is hereby pledged, of seven millions of acres of land, to be bounded as follows," &c.; and that "letters patent shall be issued by the United States as soon as practicable for the land hereby guarantied." That treaty also continues the guaranty of the outlet west, granted in the treaty of 1828.

The 4,000,000 acres given up by the western Cherokees under the treaty of 1828, having been purchased by their own means, the exclusive title to at least an equal quantity of the 7,000,000 acquired by that treaty will not be questioned; and as a great portion of these lands were regarded as being of "reduced value," it is submitted whether their title to the whole is not equally clear.

The opinion, that the lands set apart by the treaty of 1828 were intended for all the Cherokees, is weakened by the fact, that, by the treaty of 1817, 4,000,000 acres were given to about four thousand, and that the treaty of 1828 added only three millions more for at least double that number. Considering the "reduced value" of these lands, the quantity thus added was probably only regarded as proportionate to the limited emigration from the east, then expected to take place. Such, at least, seems to have been the view of the western Cherokees, from their application in 1832 for an extension of their lands, in consequence of the emigration of eastern Cherokees having been greater than was anticipated. The claim advanced by the western Cherokees is strengthened by equitable considerations, growing out of the fact that they have always cheerfully submitted to the measures of the government; that they gave up their comfortable homes in the east, and have twice been the pioneers of a new country in the west: encountering all the risks, and suffering all the hardships, incident to the settlement of a new and distant region. And it is probable that the example of their enterprise, and of their success in making themselves comfortable, happy, and prosperous, in the west, has exercised a favorable influence upon the great measure of Indian removal from within the limits of the States.

There can be no question that, in the New Echota treaty of 1835, it was erroneously assumed that the whole Cherokee country west was the common property of the Cherokees east and west. Unless, therefore, the western Cherokees can properly be regarded as parties to that instrument, it certainly gives to the eastern Cherokees no title whatever to the 4,000,000 acres clearly acquired by the other party under the treaty of 1828. At

most, it can give them title to only the excess, or 3,000,000, and that in common with the western Cherokees, should it not be considered that such excess was added by the United States as an equivalent in part for the diminished value of the lands thus obtained in exchange for those in Arkansas.

The principal stipulations of the treaty of 1835 were arranged in Washington, previous to their submission to the Cherokees east, and were well known to those west. Major Armstrong, superintendent of Indian affairs west, in a letter to the Commissioner of Indian Affairs, dated June 11, 1835, speaking of a council of the western Cherokees, "convened expressly to take into consideration the treaty offered to the Cherokees east," says, "It is my duty to inform you of a fact that is well known here, that these people are dissatisfied, and will no doubt object to the views of the government, in uniting the Cherokees, unless they can have their wishes, which I assure you are not to be found in the treaty to be laid before the eastern Cherokees." The western Cherokees delegated Joseph Vann, William S. Coody, John Smith, and John Drew, to act as their representatives in the negotiation of the treaty, and to endeavor, "if possible, to effect such arrangements as will unite the two people in one upon the Arkansas, and upon such principles as will be satisfactory to both the eastern and western Cherokees." The interference of these delegates was declared by the Secretary of War "unauthorized and officious;" they were excluded from the council, and the Commissioner was instructed to endeavor to counteract every effort on their part to interfere with the making of the treaty. James Rogers, it appears, was a delegate, having been appointed in the place of one of the others, and, of the four delegates, only himself and John Smith signed their assent to the treaty. As therefore the western Cherokees were known to be opposed to the proposed treaty, and as John Smith admitted that he signed it contrary to instructions, they cannot be considered as having been parties to it. But had the act of Rogers and Smith made the western Cherokees parties to it, there was a special reservation of any claim which the treaty, in its operation with respect to them, might involve. Of such a character the present claim may be regarded.

It is true the United States were under obligations to the States in which the Cherokees were, especially to Georgia, to extinguish the Indian title to lands within their limits; and that, consequently, it was the established policy and intention to remove the Indians as soon as it could be done; and it may have been intended that the Cherokee country west should be the final home of all those people. These considerations, however, cannot affect the title of the western Cherokees, founded, as it was, on positive and specific provisions of treaties. Nor was it probable that their title, even to the whole of the lands, would interfere with the policy of the government. Considering their readiness always to acquiesce in the views of the government, it is fair to presume that such of the lands as might be required for the eastern Cherokees, which they did not need, could easily have been obtained from them, either by the United States, or the eastern Cherokees, for a reasonable compensation. It was at one time proposed to pay the eastern Cherokees for their possessions east, and let them purchase a country for themselves. Had this been done, and they had gone elsewhere, they would not have been considered as having a claim to the country in question; and had they determined

to join the western Cherokees they would have had to pay them for so much of the lands as they needed.

For so much of the lands, which it may be determined belonged exclusively to the western Cherokees, as is necessary for the accommodation of those who removed under the treaty of 1835, they have a just and valid claim to compensation. What the extent of this compensation should be, it is somewhat difficult to say; but they themselves seem to have fixed it in the act of union, by which they agreed to relinquish their exclusive ownership of the land claimed. That act, it is true, cannot be considered binding, because its stipulations have not been, and cannot be, fulfilled; yet it indicates the consideration which the western Cherokees were willing to receive for an equal interest of the other party in the country; and there is no doubt they would have been content had the inducements held out to them to enter into it, and its stipulations, been realized. These were, a representation in the common government, by having one-third of the offices; the exclusion of John Ross and Wm. S. Coody therefrom; and a participation in the sum to be distributed *per capita*, which, it was estimated, would amount to about seventy dollars each. From the stipulation in the act of union, that they were to have an equal share in the lands east, which the Ross party still pretended to claim, they could have expected no advantage, for they were well acquainted with the provisions of the treaty of 1835, and knew that it entirely extinguished the Indian title to the lands east. If, therefore, they obtain what will be equivalent to the advantages expected to be derived from entering into the act of union, they should, and it is presumed will, be satisfied. Such equivalent will be amply realized in an entire separation from the Ross party, and by the payment of such a sum as would be equal to what they had reason to expect would be their share of the amount to be distributed as *per capita*. The necessity of such a separation, and the mode of making them the compensation mentioned, will be noticed in a subsequent part of this report.

The treaty party, so called from their having taken an active part and been instrumental in the making of the treaty of 1835, is the second of the three parties mentioned as memorializing the government. Like the old settlers, they complain of injuries and oppressions inflicted by the Ross party, which they set forth at much length in their memorial and papers. They also complain, and go into some detailed statements to show, that wrong constructions have been given to the provisions of the treaty of 1835, by which a large amount, that should have remained for *per capita* distribution, has been unauthorizedly used for other purposes; and they ask that a fair settlement, according to a just construction of that treaty, be made of the accounts of expenditures under it, in order to arrive at the sum to which they are entitled as *per capita*.

There is no doubt that the *per capita* money has been greatly reduced by the large sums placed in the hands of John Ross, as the agent of his party for the management of their removal, and by payments out of the funds set apart for the Indians, which properly should have been made from the treaaury. The amount of the payments which should have been borne by the treasury, the government is, of course, bound to refund; but the extent of them cannot be ascertained without a critical analysis of all the expenditures, which it will require some time to make, because of their having been so intermixed and commingled as to render

necessary an examination of almost, if not quite, every separate voucher. Such an examination has been commenced, and will be prosecuted with all practicable vigor, in order to ascertain the amount during the present session of Congress, as an appropriation will be necessary to replace the sum thus unjustly expended out of the Indian funds, and to enable the government to do justice to all parties. In the measures adopted for this end, the claims and representations of the treaty party, in regard to their particular rights, will receive a full and fair consideration.

That a separation, both of the old settlers and the treaty party, from the Ross party, is imperatively required, seems beyond question. Since the removal of that party there have been continual discontent and dissensions, during which the most inhuman and barbarous murders and outrages have been, and continue to be, committed. There have been many acts of the Ross party justifying the discontent of the treaty party and old settlers; such as the determination of that party, adopted on the eve of their departure for the west, to maintain their political organization, power, and laws, without regard to the rights, interests, or feelings, of the old settlers; the murders of the Ridges, Boudinot, and others; the passage of a law screening their murderers; the outlawry of members of the treaty party, simply because of their agency in making the treaty of 1835; and in some instances improperly dispossessing individuals of the treaty party and old settlers of their property. On the other hand, there have naturally been acts of retaliation committed by these parties. The dissatisfaction and vindictive feelings thus engendered still continue in undiminished force, as indicated by the recent murders of numbers of individuals, mostly of the treaty party, and the continued and constant petitions of that party, and of the old settlers, for relief and redress.

The eastern Cherokees, by law, subjected any one to be put to death who should be concerned in any measure having for its object the disposal of their lands. Hence, no doubt, the murder of Boudinot and the Ridges; and hence, also, the foundation of a feeling to which all the signers of the treaty of 1835, and their friends, may fall victims, if the parties remain in their present situation. Will the government suffer men to be thus hunted down, for an act induced by itself, and by which many difficulties between the United States and Georgia were happily avoided? In all the collisions that have taken place, the treaty party, to whom especially the United States owe protection and safety, have been the greatest sufferers. Numbers of them have been compelled to leave their homes and fly the country, and are now in a suffering condition in the State of Arkansas; and if the injuries inflicted upon them have not been instigated by prominent individuals of the Ross party, they have, at least, taken no efficient means to prevent them, or to punish their perpetrators. Under the most favorable view, those of that party holding power are either indisposed or unable to protect the lives and property of the old settlers and treaty party.

The government is the political guardian of the interests and welfare of the Indians, and its duty is to endeavor to prevent and to heal dissensions among them which engender vindictive feelings, leading to bloodshed and oppression; and the 6th article of the treaty of 1835 expressly binds the United States to protect the Cherokee Indians "from domestic strife." Every peaceful and persuasive effort for this purpose, consistent with the Cherokees remaining together as one people, has been tried in vain. The

use of military force is objectionable on many accounts, and to be avoided in all cases where it is not indispensable. In the case of the Cherokees it seems to have been almost impracticable, from the concealment and suddenness attending the outbreaks, and the manner in which those believed to have been their real instigators kept out of view. A separation of the parties appears, then, to be the only means left to be tried, in order to stop the continuance of "domestic strife," and to prevent the repetition of the horrible deeds which have been committed, among the Cherokees.

The treaty party and old settlers are, as stated, united in their wish for a separation from the Ross party; they have been companions in misfortune; there are many points of sympathy and a general good understanding between them, and, in case of a separation from the Ross party, they would doubtless unite and live amicably and happily together under a separate government of their own.

At this point the question arises, how this separation, with respect to future location, shall be made? whether it be necessary that either party should leave the Cherokee country and go elsewhere? As has been shown, the old settlers are the rightful owners of the larger proportion, if not all, of that country; and it would be greatly unjust to compel them to relinquish their rights, and a third time to undergo the hardships and sacrifices of removal. To require their removal would also not only be inconsistent with the stipulation in the treaties with them, that that country should be their permanent home, but would lead to a heavy drain upon the treasury, in order to satisfy the just claim they would then have to compensation for the lands given up, and to pay them for their improvements, the expenses of their removal, &c.; and it would be giving to the Ross party, for nothing, a vast country—much greater in extent than is either necessary or desirable for them. On the other hand, the removal of the last mentioned party is liable to similar objections. The country is sufficient for all, and if they can be separated within it, without danger of future collisions, it would be the most desirable and beneficial arrangement; as, in another generation, the present feuds and prejudices may be forgotten or forgiven) and the parties be again united under happier auspices. Such an arrangement would preserve the faith of the government to all parties, without any additional charge upon the treasury, and be merely giving to each a just proportion, in severalty, of what is now, whether rightfully or otherwise, held in common; and it is believed that, with some additional legislation, it may be so made as to be attended with but little, if any, more danger of collision than ordinarily exists in the proximity of two different tribes of any other Indians.

Prior to the treaty of 1825, the whole Cherokee people enjoyed an annuity of ten thousand dollars, of which, under the treaty of 1819, the western Cherokees were entitled to one third, viz.: three thousand three hundred and thirty-three dollars. The treaty of 1835 commuted that annuity for two hundred and fourteen thousand dollars, and added thereto three hundred thousand dollars—making five hundred and fourteen thousand dollars, to be invested as a general fund for national purposes. It also provided one hundred and fifty thousand dollars, to be invested as a school fund; and fifty thousand dollars for the benefit of orphans. These sums purchased seven hundred and eight thousand seven hundred and sixty-one dollars and thirty-nine cents' worth of five and six per cent.

stocks, which yield an annual income of thirty-six thousand and eighty-five dollars and sixty-seven cents. Of this sum, the western Cherokees, not being parties to the treaty of 1835, would be entitled to only the amount they received of the old annuity. But as the Ross and treaty party are not entitled to the whole, it is proposed to allot to the old settlers a part of it, proportioned to their numbers, and the treaty party a share in like proportion—the two comprising, it is believed, about one third of the whole Cherokee people. The remainder will, of course, belong to the Ross party. So far as the allowance to the western Cherokees will be an increase of their share of the old annuity, it will be in part payment for so much of their lands as may be taken from them in the proposed division of the country; and it is recommended that Congress be applied to for such a further sum as may be deemed an adequate compensation. A portion of this they will require for the payment of debts which they have incurred; the balance, invested with their share of the national funds, will yield them a liberal annual income for general expenses, schools, &c.

It is expected that the amount that will be found due the "treaty party," *per capita*, on a fair settlement of the accounts under the treaty of 1835, will be sufficient to put them nearly, if not quite, upon an equal footing with the western Cherokees, if they will consent to invest it with their proportion of the national funds; so that the political union, which now, and may hereafter exist between these parties, will be effectually cemented by an equality in their pecuniary interests and condition.

These arrangements will, in no respect, affect the Ross party, except in taking from under their control the members of the two other parties and their proportions of the national funds. They will not infringe upon any of the just rights of that party. The only difference to them will be that, instead of holding the entire country and the whole of the national funds in common with the old settlers and treaty party, they will hold their full proportion of each separately. Against them, therefore, they can have no good ground of objection.

The third memorial to be noticed is one presented by John Ross and others, who claim to be, and assert that they "are, in fact, the true and only representatives and authorities of the Cherokee nation," as united by the act of union adopted on the 26th June, 1840. This memorial contains a petition, in general terms, for a redress of present grievances, and for the security of the future tranquility and welfare of the Cherokee people. A very general outline is given of the relations of the Cherokees with the United States, and of the changes in their situation, since Washington's administration; and, as they "are now outside of any State or Tearitory," and "no State can now complain of intrusion" on their part, a new treaty is asked, which shall define distinctly their new position; direct the issue of a patent in fee simple for their territory; establish on a permanent footing their relations with the United States; and provide for the payment of their just claims. These demands are based on the promise of President Jackson, in 1835, that the country west should be conveyed to them by a patent in fee simple, and upon the letter of President Tyler to them of September, 1841. In that letter Mr. Tyler states: "I still propsse, at a future day, to negotiate with you anew treaty; you may assure your people that, so far as I have any power or influence to effect such results, not justice merely shall be done them, but that a liberal and generous course of policy shall be adopted towards them.

Upon the ratification of the treaty contemplated, which shall give to the Cherokee nation full indemnity for all wrongs which they may have suffered, established upon a permanent basis the political relations between them and the people of the United States, guaranty their lands in absolute fee simple, and prescribe specific rules in reference to subjects of the most interesting character, a new sun will have dawned upon them," &c. The treaty of 1828 is also cited as promising a patent for the lands west in fee simple.

As already shown the treaty of 1828 was made with the western Cherokees only, and as a separate and distinct community. The eastern Cherokees, comprised principally of the Ross party, can therefore claim nothing under it, unless an interest in the lands west, to the limited extent indicated, be conceded to them. The promise of President Jackson was based on well founded expectations that the course of conduct of the eastern Cherokees would be very different from that which has been pursued by most of them; on expectations that they would not further resist the uncontrollable necessity of a removal from within the limits of the States, and that all parties would unite peaceably and happily together in the west. But, in consequence of the counsels of Mr. Ross, and the exercise of his extraordinary influence over his infatuated party, notwithstanding the treaty of 1835 was made upon the basis of his own proposition—the submission of the principal condition to the Senate—they resisted every argument and every persuasive means that could be used to induce them quietly to remove in accordance with the provisions of that treaty, which they were told, again and again, was the law of the land, and which, therefore, the Executive was bound to enforce. They opposed every effort for their comfortable removal till the last moment, when it became requisite to use force; and they were compelled to leave their homes under circumstances of haste and want of preparation, that no doubt subjected them to some sacrifices and personal sufferings which Mr. Ross and his co-delegates have taken every occasion to magnify to the utmost of their power. But even, under these circumstances—the treaty requiring their removal at the end of two years, and the States urgently pressing the United States to a prompt execution of that stipulation; and that time having expired—the government, on the application of the Cherokees extended the period, so as to give them an opportunity to make all necessary arrangements for their comfortable removal; and, to render that removal the more satisfactory to them, they were allowed to manage it entirely themselves. Whatever losses or sufferings they may have undergone in being compelled, somewhat abruptly, to leave their homes, is justly attributable to their having blindly followed the advice and instructions of Mr. Ross; and, for them, they should hold him responsible, and not the United States. Had they, as did their brethren of the treaty party, gone to work and prepared for removal during the two years allowed them by the treaty for that purpose, they would have been comfortably removed, without sacrifice or suffering of any description. Their course, since their removal west has destroyed much of any claim to the liberal or magnanimous consideration of the government. It has been stamped with the murder and oppression of their inoffensive brothers who preceded them, and given rise to well-founded fears, on the part of many of those whose lives have been spared, that there is no safety for them but in exile from their homes and country.

During the administration of Mr. Tyler an effort was made to carry out his promises, but, as will be seen by the correspondence between the Secretary of War and John Ross and his associates, the demands of those persons were so unreasonable as to be wholly inadmissible. They do not specifically define what their wishes and expectations are; and it is not known whether their extravagant views have undergone any modification.

Any pretensions founded on the fact of union are not entitled to consideration, for that act cannot justly be regarded as valid or binding, becauae, as has been stated, its stipulations and the inducements held out to the western Cherokees to enter into it have not been and never can be fulfilled. And even had it been formally and generally adopted by the western Cherokees, which they positively deny, it was forced upon them by circumstances which entitle any application from them, that it may not be enforced to the most liberal consideration.

As has been mentioned, the Ross party went west with the determination of preserving their political organization and power. The old settlers naturally did not wish to give up everything and be governed by laws made east of the Mississippi, and which they did not consider suitable to their situation and circumstances. Thus commenced the dissensions between the parties, and several efforts to form a union between them entirely failed. The majority, consisting of the Ross party, adopted a new constitution and passed some new laws for the government of the whole Cherokee people, but to these the old settlers were still unwilling to agree. The department, however, under the expectation that the majority, who asserted themselves to be the victims of persecution, would be governed in the exercise of their power by a spirit of justice and magnanimity towards their brethren of the minority, decided not to recognise any division or separate government among the Cherokees, and that the great principle of a republican government, that the majority shall rule, must be adopted, The payment of all moneys to the Indians was also stopped, till they should unite and adopt a government to which all would submit. No alternative was left to the old settlers but a submission to the majority. Much excitement existed, and immediately after an abortive effort to form a union and adopt a constitution, proposed by the Ross party, and to which the old settlers and treaty party would not assent. Boudinot and the Ridges were murdered, and laws were passed by the majority screening their murderers and outlawing prominent members of the treaty party. The expectation, as to moderation in the exercise of power by the majority, having been disappointed, the department changed its determination, and directed that an effort should be made to form a union and system of government more just and favorable to the minority, in which they were to have one-third of the offices and power, and from which John Ross and Wm. S. Coody were to be excluded; the former, because, if not accessory to the murders mentioned, he did not at least appear to have used his influence (which was all-powerful with the majority) to prevent them, or to stop the passage of the laws screening the murderers; and Wm. S. Coody was to be excluded because he defended those murders as justifiable. Other inducements held out to the old settlers to enter into the act of union have already been mentioned. In compliance with an invitation given by General Arbuckle, under the instructions of the department, a small number of the different parties met at Fort Gibson, and hav-

ing no other alternative, and taking into view the inducements held out to them, the individuals of the old settlers agreed to adopt the act of union, with the qualification, not embodied in that instrument, but expressly stated and understood, that it was not to be regarded as binding until ratified by their people. The delegates of those people assert that it has never been so ratified, and there is no evidence to the contrary. Mr. Ross and his associates should not, therefore, be recognised as authorized delegates of the whole Cherokee people. They may, however, be recognized as the representatives of that portion of that people called the "Ross party," and any specific claims or representations they may make in that capacity will, of course, be considered in a spirit of fairness and liberality commensurate with their reasonableness and merits.

Should the views herein presented, as to the necessity and mode of separation of the Cherokee people, be concurred in and adopted, it is respectfully suggested that: in order to give the strongest and most authoritative sanction to the measure, Congress be requested to enact a law authorizing the separation, and directing a division of the lands, in such manner as may be found most suitable for the parties, and a similar division of their general funds. Some legislation will also be necessary to restrain the parties, when divided, from collisions with and depredations upon each other, which, unless there be some strong preventive, it must be admitted will be still likely to take place to some extent. Under the power vested in the United States as the responsible guardian of the interests and welfare of the Indians, and in order to fulfil the stipulation in the 6th article of the treaty of 1835, that the Cherokees shall be protected from "domestic strife," it is also recommended that a law be passed extending judicial jurisdiction over those people, so far that when individuals of either party shall be guilty of a criminal offence against the persons of the other party, or of depredations upon their property, and the party to which the individuals committing such offence belong shall fail to punish them and make all practicable reparation for the injury, such offenders shall be tried and punished by the proper judicial tribunal of the United States, in the same manner that its own citizens are tried and punished for like offences. It is further recommended, that when property of one party shall have been injured, taken, or destroyed, by persons of the other party, and the former party fails to make reparation therefor, the Executive be authorized to withhold, from any moneys payable to the party to which the aggressors shall belong, a sufficient sum for the purpose of compensating the person or persons injured. The knowledge on the part of the Indians that the United States possess such powers will go far to prevent the perpetration of such acts, and one or two cases of salutary punishment will put a stop to them altogether; and thus a necessity for their exercise will, it is expected, rarely occur.

There has also been submitted to this office a paper prepared by Mr. William H. Thomas, as agent of the Cherokee Indians yet remaining in North Carolina. The object of this paper is to show that that portion of the Cherokee country lying within the limits of North Carolina had been granted, in fee simple, by act of the legislature of that State, in 1783, to the Cherokees within her limits; that this portion of the tribe was not a party to the treaty of 1835, and that their title to the lands in question has never been relinquished by them. As, however, the lands have been

taken possession of by the State and sold to her citizens, and as the Indians do not wish to cause embarrasment, and give offence to the citizens by contending for the lands, they claim compensation for them. It is stated that they will be willing to relinquish their claims to the lands on the following conditions, viz:

1st. That, as they propose at a future day to emigrate to the west of the Mississippi, provision be made for a home for them there, and for their enjoyment of a fair portion of the general funds of the nation; and that, if a separation be made of the tribe west, as expected, these advantages be given to them, in connexion with the old settlers and treaty party, which divisions of the tribe west they prefer to join.

2d. That their claims for pre-emption rights, reservations, spoliations committed on their property in 1838, improvements under the treaties of 1817 and 1819, and for removal and subsistence to the amount of $53 33 each, be allowed to them.

3d. That a fair and full proportion of the *per capita* allowance under the treaty of 1835 be given to them; and.

4th. That it shall be left to their own choice when they shall remove west, removal not forming a condition of the payment of their claims.

As in the case of other Indians with whom the United States have negotiated for a change of their residence, the Cherokees were regarded as having only an occupant usufruct title to the lands they held in 1835, the fee simple title to those lying in Georgia and North Carolina being vested in those States. Whatever rights they had were held in common by the whole tribe east, without distinction of Georgia Cherokees, North Carolina Cherokees, or of any other division whatever. The treaty of 1835 was made without any such distinction, for the whole of their rights to the lands east, wherever they lay. There was no portion of them so far separate or distinct as to render it necessary or material that they should be specially represented in the making of the treaty. The treaty as made has heretofore always been considered and executed as applicable to, and binding upon, the whole body.

The States being considered as possessing the fee simple title to the lands within their limits, derived all the benefits arising from the extinction of the Indian title to those lands. The United States derived none. If, therefore, North Carolina had previously parted with a portion of these benefits, by a conveyance of her fee simple title to the Indians in 1783, as alleged, and the treaty of 1835 did not extinguish that title in the Indians, their claim to a further compensation for the relinquishment thereof would seem to be a question between them and the State, with which the general government has nothing to do. If, however, such a claim were recognised and allowed, the Indians in North Carolina could only benefit thereby to the extent of their limited number, for the grant of North Carolina was not made alone to them, but to the Cherokee nation—the whole Cherokee people.

The treaty of 1835 being the law of the land, the Executive has no authority to consider the Cherokee Indians yet remaining in North Carolina in any other light than as parties to that treaty in common with the rest of the tribe east at the time. It has none to recognise any claim in them not clearly authorized by that treaty. By the first supplementary article of that instrument, all claims to pre-emption rights and reservations were

relinquished by the Indians, and for the latter a moneyed compensation was substituted. So far, therefore, as the North Carolina Indians were entitled to reservations, and have not been compensated therefor, they are entitled to be paid their value as unimproved lands. They are also entitled to compensation for spoliations upon their property, and for improvements possessed by them, so far as they have not been paid; and they also possess equal right with those who have removed, to share in the money to be distributed *per capita*. If they are removed, the cost thereof is to be paid by the United States. If they prefer to remove and subsist themselves for one year west, they will be entitled to the commutation fixed by the treaty of 1835 therefor, viz. $53 33. This amount, it is contended, they are entitled to, whether they remove or not; but as it is expressly stipulated as a commutation for self-removal and one year's subsistence west, it has been repeatedly and uniformly decided that they have no claim whatever to it, unless they actually remove. Should Congress, upon the representations of the agent of the Indians in question, think proper to grant them any further allowances than those provided for by the treaty of 1835, it is respectfully recommended that it be only on the express condition of their removal west. Their natural and proper home is with their brethren in the west, where, when the present difficulties shall have been put to rest, it is believed they will be much more prosperous and happy than by residing where they now are. Every inducement should, therefore, be held out to them to remove, and none to remain. There will be no difficulty in providing them with a comfortable home there, as the country is large enough for all, and it is understood the old settlers and treaty party will willingly receive them.

The foregoing subjects have engaged the attention of this office, [illegible] referred to it a memorial and protest, with accompanying [illegible] sent to the President, and submitted to him by Mr. Ross [illegible] associate delegates, purporting to be signed by sixteen hundred [illegible] six male adults of all parties in the Cherokee nation.

These papers have a bearing upon some of the matters discussed in this report, but it is thought that they do not present a sufficiently authentic or authoritative character to entitle them to any particular consideration on this occasion.

It may be remarked that the signature or mark of Indians is easily obtained to papers of any description, by persons of influence or authority, without the individual having any real knowledge of the contents or object of the paper he is signing. Little, if any, regard is therefore to be paid to any document signed by those people generally, unless it be accompanied by satisfactory evidence that its contents were fully and fairly explained and understood by them, and that their signing of it was a voluntary act, free from any improper restraint or inducement thereto. Such evidence is usually supplied by the certificate of the United States agent for the tribe, but none of any description accompanies the papers in question. But were they duly authenticated in the manner mentioned, with the information in possession of the department, it would not be justified in disregarding entirely the petitions and representations of the old settlers and treaty party, because of the claim set up that Mr. Ross and his associate delegates are the exclusive representatives of the whole Cherokee people, and the only persons authorized to transact business

with the government for them or any portion of them, nor would they in any respect change the views herein expressed.

Very respectfully, your obedient servant,

W. MEDILL.

Hon. W. L. MARCY,
Secretary of War.

[NOTE.—Here follows in the original document from page 19 to page 171:

I. Argument of western Cherokees.
II. Argument and statement of treaty party.
III. Memorial and document submitted by John Ross and others.
IV. Statement of W. H. Thomas in behalf of North Carolina Cherokees, as their agent.

The counsel for the Cherokee Nation not deeming the papers I to III of any materiality, and no citation from them having been made on either side, omit them from this print, but include paper No. IV from which citations are made in the briefs of the parties.]

PART IV.

Argument in support of the claims of the North Carolina Cherokee Indians.

So early as the year 1783, the State of North Carolina, while a sovereign State, with a view of preventing further intrusion upon the lands claimed by the Cherokee Indians within the limits of her charter, granted to them the fee simple title; which grant, contained in the act of 1783, is in the following words:

"*And be it further enacted*, That the Cherokee Indians shall have and enjoy all that tract of land bounded as follows, to wit: Beginning on the Tennessee, where the Southern boundary of this State intersects the same nearest the Chicamawga towns, thence up the middle of the Tennessee and Holstein to the middle of French Broad river to the mouth of Big Pigeon river, thence up the same to the head thereof, thence along the dividing ridge between the waters of Pigeon river and Tuckasejah river to the southern boundary of this State; and that the lands contained with-

in the aforesaid bounds shall be and are hereby *reserved* unto the said Cherokee Indians and their nation *forever:* any thing herein to the contrary nothwithstanding."—(See page 2.)

By the 8th article of the treaty of 1817, and the 2d article of the treaty of 1819, a reservation of 640 acres was granted to a Cherokee by the name of Euchella, which was located upon the lands ceded under the last mentioned treaty. The cession contained a part of the land included in the grant made by the State in 1783, as represented by a dotted line on the map annexed. Subsequently the State of North Carolina sold the lands that had been previously granted to Euchella, to Joseph Welch, who took forcible possession. An action was brought in the name of Euchella, for the recovery of the reservation, which was finally decided in his favor by the supreme court of the State. In that decision, which will be found in the 3d volume of Hawk's Reports, page 163, the court say: "By the act of 1783, ch. 185, it is declared that the Indians shall have and enjoy all the tract of land therein described, and that it is reserved to them and their nation forever. The effect of this grant was to vest the land in the nation in *fee simple*. It conveyed to them a definite and specific right, according to which they could no longer be considered as tenants at sufferance, but as holding under the faith of the State and the guaranty of the declaration of rights.

"It is true that no individual had a distinct portion allotted to him, which he might protect from aggressions, and on that account the legislature has made it penal to trespass on the land; but the right of the legislature to make the grant cannot be doubted; and it is not less clear that it must inure to the benefit of the tribe as long as they *subsist upon it*, and their *title* is not *surrendered* by their own *consent*.

"If this grant required confirmation, it has received it in the most ample manner by the treaty of Hopewell, (1785), made under the authority of the United States, and by the treaty of Holstein, (1791,) by which the lands not ceded by the Cherokee nation are solemnly guarantied to them."

It is clear and indisputable, that, by the act of 1783, and the construction which was subsequently given to it by the supreme court of the State, that the fee simple, as well as the usufructuary interest in the lands which are described in the recited grant, vested in the Indians from and after its date. The next inquiry is, how these lands become the exclusive property of that portion of the tribe that resided upon them. At the date of the grant referred to, the Cherokee tribe consisted of seven clans, which most probably were the descendants of the same number of families. These seven clans embraced about fifty towns or settlements, each of which was governed by a chief who was denominated the father of the town, and the union between the chiefs of the different towns extended no further than to objects in which all the tribes or clans were interested, such as declaring war, making peace, and concluding treaties. The Cherokees, in course of time, in consequence of occupying a high country, at and near the terminations of the Smoky mountain and Blue Ridge, and also a low country adjoining thereto in the valley of the Mississippi, became divided into two divisions, (one denominated the upper, and the other the lower towns,) which led to a division of the lands for the separate use of each portion of the nation, by the common consent of the tribe, and the approval of the President of the United States, as is shown by the recital of the transaction in the book of

Indian treaties, page 209. It is there stated: "Whereas, in the autumn of the year one thousand eight hundred and eight, a deputation from the *upper* and *lower* Cherokee towns, duly authorized by their nation, went on to the city of Washington, the first-named to declare to the President of the United States their anxious desire to engage in the pursuits of agriculture and civilized life in the country they occupied, and to make known to the President of the United States the impracticability of inducing the nation at large to do this, and to request the establishment of a *division line* between the upper and lower towns, so as to include all the waters of the Hiwassee river to the *upper town* * * * * * *

"The deputies from the lower towns, to make known their desire to continue the hunter life, and also the scarcity of game where they then lived, and under these circumstances their wish to remove across the Mississippi river on some vacant lands of the United States. And whereas the President of the United States, after maturely considering the petitions of both parties, on the ninth day of January, A. D. one thousand eight hundred and nine, including other subjects, answered these petitioners as follows: The United States, my children, are the friends of both parties, and, as far as can be reasonably asked, they are willing to satisfy the wishes of both. Those who remain may be assured of our *patronage*, our *aid*, and *good neighborhood*. Those who wish to remove are permitted to send an exploring party to reconnoitre the country on the waters of the Arkansas and White rivers." * * * * * * *

Thus, a *permanent divisional* line was established along the *ridge* which divided the waters of the Hiwassee river from those of the Hightower. By this allotment the lands included in the grant made by the State of North Carolina, in the year of 1783, were set apart for the exclusive use and permanent residence of the Upper Town, or North Carolina Indians.

The remaining question to be considered is, have the North Carolina Indians conveyed their interest in those lands to the United States? It is true that the State of North Carolina, acting upon a supposition that the lands she granted to the Indians, by the act of 1783, had been conveyed to the United States by the treaty of 1835, surveyed and sold to her citizens most of the valuable lands included in her present limits, for near five hundred thousand dollars. It is also true that the State of Tennessee, acting upon a similar supposition, made sale of that portion of the land contained in the grant of 1783, which was included in her chartered limits; and it is probable that she received a larger sum than those in the State of North Carolina sold for. As the titles of the citizens, in both these States, to lands which they have purchased and improved, must depend upon the title of the United States as derived from the treaty of 1835, it is necessary to examine if the lands in question were, or were not, conveyed to the United States by the cession contained therein.

To determine upon that question, the following inquiries are necessary to be made. Did the Cherokees, who were parties to the treaty, possess any of the attributes of sovereignty, and as a body politic possessing these powers become a party to the treaty? Or did they, as private individuals in a state of *duresse*, sign the treaty for the benefit of themselves and a majority of the tribe who were similarly situated, who, under the circumstances, might come in and partake of its advantages? A majority of the tribe re-

sided at that time in the lower town, within the chartered limits of the State of Georgia, where the treaty was concluded. But prior thereto, that State, by the acts passed by her legislature, had extended her laws over the Cherokees, and not only annihilated their government, but, by the statutes referred to, prohibited them from assembling in council to enact laws, or to attempt to enforce those which had previously been enacted, making the latter a penal offence, punishable on conviction with confinement in the penitentiary. And at the time the treaty was concluded, a part of the Cherokees were in prison for violating those laws, and some of the signers to the treaty had been released from confinement but a short time. Not only were the Cherokees in Georgia, at the time the treaty was concluded, deprived of all their political rights, and subjected to the laws passed by the State, but by those laws their lands had been surveyed, and granted by the State to her citizens, as is shown by the 16th article of the treaty.

While it must be conceded that the Cherokees who were parties to the treaty acted only in the capacity of private individuals, and did not claim to possess any political power, it is equally true that they were the very best men in the nation, and, before their government ceased to exist, held important offices under it, and had as much right to claim to be chiefs as any Cherokees in that part of the nation.

John Ross, and those associated with him, who claimed to be the constituted authorities of the nation, possessed no political power whatever, agreeably to the constitution and laws of the nation, even if they had remained in force; and Ross, and many of those who claimed to be chiefs, were citizens of the United States, having become citizens under the treaty of 1819; and, by promising to remain permanently on the lands ceded to the United States, were given fee-simple titles to reservations which, in value, were much more than their share of the common property of the nation. Subsequently they sold the reservations they had promised to reside permanently on, and moved on the unsold lands of the nation; but, after being made citizens of the United States, they could not expatriate themselves by removing into the nation within the limits of the United States; and, at one time, John Ross, during the existence of the Cherokee government, was both chief of the nation and postmaster, holding the latter office under a commission received from the United States.

The official correspondence furnishes further proofs that the Cherokees, who concluded the treaty, admitted that the Cherokee government had, prior to its conclusion, ceased to exist, and that the government of the United States had ceased to recognise any government among the Cherokees. In a letter signed by John Ridge and S. Watie, addressed to the commissioner who concluded the treaty on the part of the United States, (Rev. John F. Schermerhorn,) they say: "Previous to the extension of the laws of Georgia, Alabama, Tennessee, and North Carolina, over our nation, our government was elective according to a constitution. This *government ceased in* 1830, and no elections have been held since; and all the *members* of that *government, chiefs, members of committee*, and *council*, became *private individuals*." (See Sen. Doc. No. 120, p. 529.)

John Ridge was probably as well informed as any man in the nation, and, in his opinion, the chiefs that signed the treaty of 1835 were, from the time the laws of the State were extended over them, private individuals, and void of political power. As a further proof that the chiefs who signed the

treaty, as well as the council that proved it, were at the time destitute of any government of their own, and subject to the laws of Georgia, Major Ridge and John Ridge, who have since fallen by the hands of assassins, in their letter to President Jackson, say: "The Georgia laws, which deny us our *oaths*, are thrown aside; and notwithstanding the *cries* of our people, and protestation of our innocence and peace, the lowest classes of the white people are flogging the Cherokees with *cowhides, hickories and clubs*. We are not safe in our houses; our people are assailed by day and night by the rabble. Even justices of the peace and constables are concerned in this business. This barbarous treatment is not confined to men, but the *women* are *stripped* and *whipped* without mercy." (See Sen. Doc. No. 120, p. 608.)

In a letter to President Jackson, which bears date December 1, 1835, signed by Major Ridge, Elias Boudinot, (the latter also has since been murdered by assassins,) and ten other Cherokees, they say: "The undersigned chiefs, who are in favor of removing west, would address you as guardian of the Indians. At this crisis of our affairs, when *we have ceased to exist in our national capacity*, we can look to no one to protect the rights of the poorer class of our people, and save them from the miseries which seem to await them from utter extermination, except our political father—to him we trust we can look with confidence for aid and protection." (See Sen. Doc. 120, p. 490.)

Not only did the Cherokees, who, as private individuals, became a party to the treaty of 1835, regard their government at an end, and that the tribe had ceased to exist in its national capacity; but the President of the United States seems to have entertained the same opinion. The Commissioner of Indian Affairs, in a letter to John John Ross and others, says: "The President has ceased to recognise any *existing government* among the Cherokees." (See Sen. Doc. No. 120, p. 132.)

Having shown that the Cherokee nation had ceased to exist prior to the conclusion of the treaty, and the Cherokees who were a party to it acted only in the capacity of private individuals, who had become subjects of the State by the extension of her laws, by applying a few of the principles laid down in Vattel's law of nations, it will be seen that the Cherokees of Georgia were incapable of making any treaty or entering into any other contract with the government of the United States whereby they could have conveyed the lands granted to the North Carolina Cherokees by the act of 1783.

Vattel defines a nation to be "a body politic or society of men united together for the purpose of promoting their mutual safety and advantage, by their combined strength." * * * * "And that it governs itself by its own laws."

"But a *people that has passed under the dominion* of another is no longer a State, and can no longer avail itself directly of the law of nations." See chapter 1, page 2.) "The *preservation* of a nation consists in the duration of the political association by which it is formed. If a period is put to this association, the nation or State no longer subsists, though the individuals that compose it still subsist. In case of real subjugation to a foreign power, the citizens who do not approve this change are not obliged to submit to it; they ought to be permitted to sell their effects and retire elsewhere. For my having entered into a *society* does not oblige me

to follow *its fate*, when it *dissolves itself*, in order to submit to a foreign *dominion*. I submitted to the society as it then was, to live in that society as the member of a sovereign *State* and not in *another;* I am bound to obey it while it *remains* a *political society;* but when *it divests itself* of that quality in order to receive its *laws* of *another State*, it breaks the bond of *union* between its *members* and *releases them from foreign obligations*." (See section 195, page 94.)

It has been shown in the preceding that the Cherokee Indians, at the time the treaty was concluded in 1835, had, by passing under the *laws of the States, ceased to exist as a nation*, and, agreeably to the laws of nations, were incapable of making any treaty binding upon the individuals of which the nation had been composed without their *consent*.

It has never been contended that the Cherokees of North Carolina were present, or even represented, at the council held by the Cherokees of Georgia, at the time the treaty was concluded. This fact is established by the report of the commissioner who negotiated it on the part of the United States. In his report to the Secretary of War, bearing date the 30th of December, the next day after the treaty was concluded, he says "the chiefs of the North Carolina Indians did not attend here"—at the place the treaty was concluded. (See Senate document No. 120, page 495.)

The question therefore resolves itself into this: could the Cherokees of Georgia, by an agreement entered into while in a state of *duresse*, acting as private individuals or denizens of the State, convey to the United States the lands owned and occupied by the Cherokees in North Carolina, which had been granted to them by the State, and in which they held the fee simple title, not as derived from their tribe, but, as the supreme court of the State has decided, under the guaranty of the State, without their consent, and without even making mention in the conveyance of any intention to convey the lands which had become the private property of the North Carolina Indians? The cession of lands, as contained in the treaty of 1835, is in the following words: "Art. 1. The Cherokee nation hereby cede, relinquish, and convey to the United States all the lands owned, claimed, or possessed by them east of the Mississippi river."

From the indefinite wording of the cession it is obvious that the commissioner acting on the part of the United States did not know that the State of North Carolina had granted the fee simple title to the lands within her limits to the Cherokees residing upon them; and supposing that the only interest the nation had in the lands to be ceded was the usufructuary interest, made use of the same words as are usually made use of in treaties with Indian tribes to convey an interest of that description. And if he had known the nature of the title by which the North Carolina Indians held their lands, he must have known that the words used in the cession conveyed nothing more, even if the Cherokees had possessed the power competent to treat, than the usufructuary interest owned by the tribe. The treaty does not purpose to convey any portion of the private property of individual Cherokees; nor did it ever enter into the minds of the contracting parties to convey any greater interest in the lands than the interest stated—the right of occupancy—such as the Indian tribes have been admitted to possess since the discovery and settlement of this country by the nations of Europe. Anxious to avoid all litigation respecting the rights of the Cherokees remaining in North Carolina to the lands granted to them by the State; know-

ing that it would be attended with much trouble and expense to them, as well as to the citizens of North Carolina and Tennessee who resided on the lands. During the last ten years, as the records of the War Department prove, every means in my power have been used to obtain a just compensation to be made to the Indians by the government of the United States. That being done, the question of title to the lands contained in the grant made to the North Carolina Indians would be settled. The Cherokee nation since relieved from a state of duresse, have sanctioned the treaty of 1835. The present Cherokee government, (formed since the emigration of the tribe west of the Mississippi river,) authorized their principal chief to receive of the *per capita* money, provided for under the 15th article of the treaty, $581,346 88; which, out of the appropriation made to carry that provision of the treaty into effect, on the 6th of September, was paid to Jonn Ross; also the nation has been in the receipt of the annuities arising from the investment of $764,000 under the provisions of the treaty, and has received the further sum of $172,316 47, (March 7, 1840,) paid out of the *per capita* fund to the Cherokees west, while the North Carolina Indians are not allowed to occupy but a very small portion of the lands which were granted to them by the State for a permanent home; nor can they obtain compensation for them. Shortly after the present administration came into power, my application, so often made for the reference of the questions relating to the claims of the North Carolina Indians to the Attorney General, was renewed. The President finally consented to refer the questions raised by me, and on the 11th of June, 1845, submitted them to the Attorney General for his opinion; and on the 19th September, he addressed a communication to the President in which he says: "On the 11th of June last, you did me the honor to refer to me a report of the Commissioner of Indian Affairs of the 19th of May, and a reply thereto of William H. Thomas, on behalf of certain Cherokee Indians," * * "on which you desire my opinion in writing. * * * In a memorandum which is amongst the papers transmitted, there are four questions propounded:

"1st. Are the Cherokees remaining in the State of North Carolina and Tennessee entitled, under the 8th and 12th articles of the Cherokee treaty of December, 1835, to $53 33 for their claims for removal and subsistence allowance, which have been paid to the Cherokees in Georgia?

"2d. In the event that the Attorney General should be of opinion that the Cherokees in North Carolina and Tennessee are not entitled to compensation for their claims for removal and subsistence allowance, whether the grant made by the State of North Carolina to the Cherokee Indians in the year 1783, vested the fee simple title in the Indians while they continued to reside thereon; and whether, under the provisions of the grant, the fee simple title has not vested exclusively in the Cherokee Indians within its limits?

"3d. Whether the treaty of 1835, made with the Cherokee Indians of Georgia, does or does not legally convey to the United States the lands granted to the North Carolina Indians by the act of 1783? Whether the power of the Cherokees as a nation had or had not ceased to exist at the time the treaty of December, 1835, was concluded, in consequence of the tribe having passed under the dominion of the States?

"4th. Whether the relinquishment of interest in the lands which the treaty of 1835 purports to convey is or is not confined to those Cherokees who

have and do receive their due portion of the consideration money; and whether the title of those who receive no part of the compensation has passed to the United States?

"The first of these involves an inquiry whether, under the treaty of New Echota, those Cherokees who had remained in the States of Tennessee and North Carolina are entitled, under the 8th and 12th articles of the treaty, to $53 33 for removal and subsistence allowance?

"This inquiry is embarrassed by the fact that these allowances have been made to Cherokees who have remained in Georgia, by decisions at the War Department, and by the fact of payment being made to others of the tribe who did not emigrate. By the joint resolution of Congress approved June 15, 1844, the interpretation under which the Georgia Indians were paid appears to have been acted on by the War Department but for a short time." * * * * * * *

"The circumstances under which payments were directed by the joint resolution are stated in the report of the Commissioner of Indian Affairs. It appears to me that the confirmation of the decision of Messrs. Eaton and Hubley, declared by that resolution, cannot, with all the respect due to Congress, be regarded as settling the construction of the treaty, so as to furnish a guide to the Executive in carrying a treaty, as a law, into effect. * * * * * * * *

"In its construction, it is said that 'the language used in treaties with Indians should never be construed to their prejudice.' * * 'How the words of the treaty were understood be this unlettered people, rather than their actual meaning, should form the rule of construction.'

"In the papers accompanying your communication are several statements, furnished by the commissioner who negotiated the treaty on the part of the United States, and by respectable persons who were privy to the negotiation, tending to show that the Indians were assured that those who did not emigrate should have the benefit of this pecuniary allowance. According to well established rules of law, I am of opinion that this evidence is not admissible to establish a construction of the treaty inconsistent with its provisions. Whatever may be done by *Congress to fulfil expectations thus created*, I am clearly of opinion that the Executive cannot execute the treaty on any such construction."

"The other three questions may be solved into three inquiries, whether the lands in North Carolina belonged to the North Carolina Indians residing upon them. These lands have been sold by the State of North Carolina, and are, I presume, in the possession of the purchasers. As the Executive of the United States would have no power to *divest those in possession*, and the question is one for the *judiciary*, I have deemed it unnecessary to embrace my views upon it in this communication. Nor have I deemed it proper to express my opinion on the *hard measure* which seems to have been dealt out to the North Carolina *Indians*, whose *lands* have been *sold*, while they have received *no* corresponding *benefit*. I have examined the question as one of legal construction only, and have no doubt of the correctness of my conclusion in that respect.

"JOHN Y. MASON."

This opinion, on the 2d of October, was approved by the President of the United States, and he made the following endorsement on the papers: "I concur in opinion with the Attorney General." The following conclusions seem to be deducible from it:

1st. That, if the decision had been made upon the question of the fee simple title having vested in the North Carolina Indians to the whole quantity of land granted by the State of North Carolina in the year 1783, and that the title derived from the State, and held by them under her guaranty, was not conveyed to the United States by the treaty of 1835, it would have been in favor of the Indians, and that they were entitled to the possession of the lands. For if he had not believed that the decision, if made, would be as stated, the reason for declining to give it—"that the Executive of the United States did not possess the power to divest those in possession"—did not exist. It is obvious, therefore, that a compliance with his decision, if made, would require the removal of the whites in North Carolina and Tennessee, who had become purchasers under the States of the lands reserved for the use of, and at present owned by, the North Carolina Indians. The opinion, that those lands were not conveyed to the United States under the treaty of 1835, is further proved to have been entertained by the War Department since the ratification of the treaty. The agent of the Cherokees, B. F. Curry, by instructions which emanated from that department on the 28th July, 1836, was authorized to obtain a relinquishment, from the North Carolina Indians, of all their right "to occupancy in, and to the country east of the Mississipi, and a surrender of all their rights in the same." (See Senate doc. No. 120, p. 156.) The agent, in obedience to his instructions, made propositions to the Indians for a surrender of their title to the lands in North Carolina, but they refused compliance. Since then nothing further has been done by the government of the United States to perfect her title, or to purchase that of the North Carolina Indians.

The Cherokees of North Carolina, notwithstanding they had no political connection whatever with the Cherokees of the lower town, after they has passed under the laws of the States in which they resided, and were not present or represented at the council of Cherokees, who, in their individual capacity, met at New Echota, Georgia, and negotiated the treaty of December, 1835, have, nevertheless, since that time, on receiving information that a treaty had been concluded with their brethren in Georgia, signified a willingness to assent to the cession of the usufructuary interest which the Cherokees had in the lands east, as provided for under the 1st article, and have also agreed to abandon the lands granted to them by the State of North Carolina, for the benefit of the purchasers, on condition that their proportion of the moneys appropriated by Congress as a consideration for the common property, previously owned by the nation, was paid to them, and they permitted to remain in the State subject to her laws, and "purchase residences for themselves like white persons," as provided under the 12th article of the treaty, removal west being left to their own option.

By the 15th article, the moneys appropriated by the act of 2d July, 1836, and 12th June, 1838, amounting in the aggregate to $6,647,067, were to be apportioned by the United States, as trustee, among all the Cherokees included in the census of the portion of the tribe at that time remaining east, in the following manner: A division of the eastern Cherokees being contemplated, a portion to remain and become citizens of the States under the 12th article, and the remainder to join the portion of the tribe then west of the Mississippi river. As an inducement to unite at some future period the Cherokee people in the country assigned for their permanent residence west, $500,000 were deducted from the price of the lands east, for 800,000

acres west, adjoining to the lands occupied by former emigrants, for the use of the tribe west; also a national fund was provided (10th article) of $200,000

For the purposes of education, was provided under the 10th article, and supplemental 3d article - - - - - 250,000

For the orphans of the tribe, under the 10th article, was provided the sum of - - - - - - - 50,000

500,000

Also a permanent annuity arising under treaties made with the eastern Cherokees was commuted for $214,000, and transferred west for the use of the whole Cherokee people west of the Mississippi, as a national fund - - - - - 214,000

In addition to this, the school fund, created by sale of lands set apart for that purpose by the eastern Cherokees, was transferred west to be added to the school fund - - - - 50,000

$764,000

The sum, therefore, of $764,000, in which the Cherokees that remained in the States had a common interest, was transferred west. Of that sum only $500,000 were chargeable on the appropriations referred to, which, with the sum paid for lands west, $500,000, make the sum of $1,000,000 to be deducted from the appropriations of $6,664,067, leaving a balance of $5,664,067, which sum is subject to another charge of $60,000 for the national debts; leaving to be apportioned among the Cherokees included in the census referred to in the 15th article and 3d supplemental article, $5,604,067. At the time the emigration closed, in 1838, it was ascertained that at the places the Cherokees were collected for emigration, and when on their journey to the west, about 2,000 died, and thereby diminishing the number, embraced in the census, from 16,737 to 14,737. Of that number about 1,500 remained in the States of Georgia, Alabama, Tennessee, and North Carolina—principally in the latter State—which would leave in the west, when the emigration closed, of those included in the census, besides their slaves that emigrated with them, 13,237. Since that time the portion of the tribe west have diminished in numbers so rapidly that unless the causes can be removed they must become extinct in a few generations; while those that are remaining east, under wholesome laws and regulations, have increased in about the same ratio as the white population. The Cherokees in North Carolina, at the time a census was taken, in 1840, numbered 1,069. Since then no census has been taken of the Cherokees east, except of one town by the name of Qualla, situated on the lands granted by the act of 1783. At the time the former census was taken, in 1840, the total number was 669. Four years afterwards, when the census was again taken, it showed an increase of 113, making the total number 782. The Cherokees of that town probably have increased as fast as any other people, have almost entirely abandoned the use of all intoxicating drinks, under the influence of a temperance society, established by one of the chiefs, and have become cultivators of the soil. Supposing the balance of the North Carolina Indians to have increased in the same proportion, and that the increase has continued to the present time, it would give in that State, including scattering individuals that have removed there from the State of Georgia, 1,489. Their proportion of the funds subject to distribution under the 15th

article and 3d supplemental article of the treaty, supposing the increase east to be equivalent to the decrease west, and that the present number entitled to per capita allowance is equal to what it was at the close of the emigration, by including a few who emigrated between 1833 and 1835, (14,737,) would give, as the equitable proportion to which the North Carolina Indians would be entitled, the sum of $497,881 80, while it is a well-established fact that they have not received as much from the United States as was due them for improvements, &c., under the treaties of 1817 and 1819, and what has been received has been paid to a few individuals of the whole number; and to them payment was not made for their lands, but for improvements they were forced to abandon for the use of the whites. Reservations were not paid for out of the proceeds of the sales of the Cherokee lands east, being chargeable to the United States, and payable out of funds to be appropriated for that purpose.

Having shown what the share of the North Carolina Indians would be if an equitable distribution of the funds were made, after setting apart $764,000 for the separate use of the tribe west, I will now proceed to state upon what conditions they are willing to relinquish their interest in the lands contained in the grant made to them by the State of North Carolina in the year 1783, so as to avoid resorting to the mode of adjustment of the question pointed out in the opinion of the Attorney General of the United States, which was, to leave it to the decision of the Supreme Court. The following provisions, construed as the Indians understood them, authorize the payment of as much money as would satisfy the Indians under existing circumstances.

By the 12th article of the treaty, it is provided for the Cherokees remaining in the States as follows: "Those individuals and families of the Cherokee nation, that are averse to a removal to the Cherokee country west of the Mississippi, and are desirous to become citizens of the States where they reside, and such as are qualified to take care of themselves and their property, shall be entitled to receive their due portion of all the personal benefits of the treaty for their claims, improvements, and *per capita*, as soon as an appropriation is made for this treaty."

"Such heads of Cherokee families as are desirous to reside within the States of North Carolina, Tennessee, and Alabama, subject to the laws of the same, and who are qualified or calculated to become useful citizens, shall be entitled, on the certificate of the commissioners, to a pre-emption right to one hundred and sixty acres of land, or one quarter section, at the minimum Congress price, so as to include the present buildings or improvements of those who now reside there."

The 13th article provides for the payment of the value of reservations granted under the 8th article of the treaty of 1817, and the 2d article of the treaty of 1819, that have been sold by the States, except in cases where the life estate reservees had sold their reservations, or any part thereof, and conveyed the same by deed or otherwise, and have been paid for the same: "they, their heirs or descendants, or their assigns, shall not be considered as having any claims upon the United States under this article of the treaty." * * * * * * * *

"It is expressly understood by the parties to this treaty, that the amount to be allowed for reservations under this article of the treaty shall not be deducted out of the consideration money allowed the Cherokees for their claims for spoliations and the cession of their lands; but the *same is*

to be paid for independently by the United States, as it is only a just fulfilment of former treaty stipulations."

By the 1st supplemental article, it is provided "that all the pre-emption rights and reservations provided for in articles 12 and 13 shall be and are hereby relinquished and declared void," for which compensation is provided by the 3d article for the reservees and pre-emptors in lieu of their rights. "It is therefore agreed that the sum of six hundred thousand dollars shall be, and the same is hereby, allowed to the Cherokee people, to include the expense of their removal, and all claims of every nature and description against the government of the United States, not herein otherwise expressly provided for, and to be in lieu of the said reservations and pre-emptions."

The 16th article provides that the Cherokees, with the exception of those that chose to remain east under the 12th article, should remove to their new homes "within two years from the ratification of this treaty, and that during such time the United States shall protect and defend them in their possessions and property, and free use and occupation of the same." * * "And if this is not done, and the people are left unprotected, then the United States shall pay the several Cherokees for their losses and damages sustained by them in consequence thereof."

Under this provision of the treaty it became the duty of the government to protect the Cherokees until the emigration closed, or pay the damages the individuals sustained for want of the protection promised. Either is a compliance with the treaty, and was probably so provided to enable the general government to avoid collisions with the State authorities, by making it optional with the government to protect the property of the Indians, or pay the damages they sustained.

Under the foregoing provisions of the treaty the following claims are provided for, in favor of the Cherokees east.

Under the 12th article of the treaty it is stipulated that those who remain under that provision "shall be entitled to all the *personal benefits of the treaty*." The term "*personal benefits*," as here used, signified all benefits of the treaty except the $1,264,000 set apart for the exclusive use of the nation west, and therefore termed national funds. In those personal benefits were comprehended removal and subsistence, or commutation therefor in money, which was limited by the 8th article to $53 33 each: there remains due to the North Carolina Indians, (1,489 persons) under that provision of the treaty, which became due at the time they chose to remain east - - - - - - - $79,418 37

Interest on that sum from the time the government under the same provisions of the treaty paid most of the Cherokees remaining in the State of Georgia, 8 years - - 39,254 18

The payment of per capita under the same article was to have been made on the 2d of July, 1836, to the Cherokees that remained east; nearly ten years have passed, and not a dollar of it has been paid to them yet, while two payments out of the per capita money have been made west.

On the 6th of September, 1841, there was paid out of the per capita fund to John Ross, on an order from the Cherokee council as agent of the tribe, $581,346 88.

By a decision made by the Secretary of War, bearing date March 9, 1840, there was paid to the Cherokees west, to be charged as per capita, $172,316 47.

The two payments of per capita above referred to amounted in the aggregate to $753,663 35, for which the Cherokees of North Carolina, as an equivalent therefor, are entitled to	$79,710 53
And interest on that sum from the 2d of July, 1836, to the 2d of July, 1846 - - - - - -	47,826 00
	246,209 08

The balance of their claims for reservations and pre-emptions relinquished under the supplemental articles of the treaty, and improvement claims provided for under the 2d article of the treaty of 1819, as well as claims for property lost by the Cherokees east, in consequence of the government failing to protect them until the emigration was completed as provided for under the 16th article of the treaty, can only be settled by a board of commissioners. What is here said in reference to the claims of the North Carolina Indians is equally applicable to the claims of those residing in the other States.

Having stated in the preceding remarks the claims of the Cherokees east, and cited the articles of the treaty which provide for them if a construction be established in accordance with the intention and understanding of the parties—and certainly an instrument affecting the rights of absent persons, made without their consent, ought, if they would submit to it, to be construed fully as liberal as those contracting for them intended—I will, in conclusion, adduce some evidence to show the different classes of Cherokees remaining in the State of North Carolina, and the laws passed by the State for their benefit, as well as some evidence of the opinion entertained of them by their white neighbors as to their being peaceable and orderly citizens.

The Hon. T. Hartley Crawford, (former Commissioner of Indian Affairs,) in his report to the Secretary of War, dated 22d February, 1844, says: "There are Cherokee Indians east of the Mississippi river who have been variously estimated from 1100 to 1200. They are believed to be in North Carolina, Georgia, and Tennessee, chiefly in the former State; of those in North Carolina, a portion (333,) I have learned, petitioned the commissioners and committee appointed to carry into effect the late treaty concluded at New Echota, December 29, 1835, stating that they were averse to removal to the Cherokee country west of the Mississippi, and desire to continue citizens of and subject to the laws of the State of North Carolina, where they reside."

"Another portion of them, called Euchella's band, from the part they took in arresting the murderers of some soldiers, induced the white citizens to request the military commander (Col. Foster) to permit them to remain east, which was granted; and the remainder of those east, or the third class, includes those who were unable from age and infirmity to remove, and their children left to take care of them." * * * *

"Upon looking into the only two volumes of the Laws of North Carolina that are accessible by me, I find that in the year 1783 a certain tract of land, partly in Macon and Haywood counties, North Carolina, and partly in the State of Tennessee, was reserved unto the said Cherokee Indians and their nation forever."

"I have been able to procure a manuscript copy (certified) of a law of the said State, passed in January, 1837, entitled "An act to prevent frauds on

Cherokee Indians residing in this State," by which it is enacted "That all contracts of every nature and description, made after the eighteenth of May, one thousand eight hundred and thirty eight, with any Cherokee Indian, or any person of Cherokee Indian blood within the second degree, for an amount equal to ten dollars or more, shall be null and void, unless some memorandum thereof be made in writing, and signed by such Indian, or person of Indian blood, or some other person by him authorized, in the presence of two creditable witnesses who shall also subscribe the same."

It will be observed that this law was passed two years before the emigration commenced, giving the assent of the State not only to the educated half-blood Cherokees, but to the full blood Indians who chose to remain in the land of their fathers, to take protection under the egis of her laws. Having been mostly born in the State, nothing more was necessary to make them citizens but a continued residence within her limits twelve months, agreeably to the laws of the State. The State has not been unmindful of the small remnant of aboriginal inhabitants that, by her consent, yet dwell in the land containing the sacred relics of their ancestors. At the session of the legislature in 1844, a law was passed to encourage them in the raising of silk, and authorized them to incorporate themselves into a company capable of purchasing and holding lands in the State, and to exercise other corporate rights and privileges; and the preamble to the law recites—"Whereas a small portion of the Cherokee tribe of Indians are remaining in this State, who are represented by their white neighbors as conducting themselves in a peaceable and orderly manner, and who, under the influence of temperance and religious societies, are fast improving in the knowledge of the mechanic arts, agriculture, and civilization; and whereas the Cherokees referred to, who belong to the towns of Qualla and Yunsaw, (Cheoih,) have already commenced the culture and manufacture of silk, and for the encouragement thereof—Be it enacted, &c.;" and at the same session, the legislature passed a resolution requesting the Senators and Members in Congress from that State to use their influence to have the just claims of those Indians settled.

Respectfully submitted.

With the highest respect, your obedient servant,

WM. H. THOMAS,

An adopted Cherokee, and Att'y for the E. Cherokees.

Hon. WM. MEDILL,

Commissioner of Indian Affairs.

20th CONGRESS, 1st Session. [Doc. No. 104.] HO. OF REPS. War Dept.

RESERVATIONS UNDER THE CHEROKEE TREATY.

DEPARTMENT OF WAR.
January 23, 1828.

SIR: I have the honor, in obedience to a resolution of the House of Representatives, of the 16th instant, of submitting, herewith, a communication from the Clerk charged with the Indian business of this Department, accompanied by a list of persons entitled to reservations under the treaty with the Cherokees, of 27th February, 1819, according to the treaty, and the returns of the commissioners appointed to superintend the surveying and laying off said reservations, distinguishing between those who are entitled to reservations in fee simple, and those who are entitled to reservations for life only.

I have the honor to be,
Your obedient servant,
JAMES BARBOUR.

The SPEAKER *of the*
House of Representatives.

DEPARTMENT OF WAR,
Office of Indian Affairs, January 19, 1828.

SIR: I have the honor to accompany this with an abstract, in conformity to a resolution of the House of Representatives, of the 16th instant (and upon which you have directed me to report to you) of each and every head of an Indian family, who is entitled to a reservation of land, by virtue of the treaty made between John C. Calhoun, late Secretary of War, and the Chiefs and Head Men of the Cherokee Nation of Indians, at the City of Washington, on the 27th day of February, 1819, distinguishing between those who are entitled to reservations in fee simple, and those who are entitled to reservations for life only, with reversion in fee simple, so far as the records of this office enable me to do so. There is no information in this office in regard to the question of reversion.

Respectfully submitted,
THO. L. McKENNEY.

To the Hon. the SECRETARY OF WAR.

LIST OF PERSONS entitled to Reservations under the Treaty with the Cherokees, of 27th February, 1819, according to the treaty, and the returns of the Commissioners appointed to superintend the surveying and laying off said Reservations, to the Department of War, showing those entitled to Reservations for life, and those entitled to Reservations in fee simple.

FOR LIFE.

1 Choctaw
2 John Miller
3 Allen B. Grubb
4 Co-lo-nees-kie
5 Tall-o-tuskee
6 Betsy McIntosh
7 Path Killer
8 Bold Hunter
9 Willie Tooten
10 James Coody
11 John Spear
12 Jacob
13 Con-naugh-ty
14 Yoon-no-gy-kah
15 Big Tom
16 Bag, or Sapsucker
17 Johnston
18 Oo-lah-not-tee
19 Back Water
20 The heirs of Too-lee-noos-tah
21 Jack
22 Thomas
23 Cul-sow-wee
24 Parch-corn Flower
25 Panther
26 Ca-te-hee
27 Yellow Bear
28 Jenny
29 The Bear going in the hole
30 John
31 Beaver-toter
32 John Quchey
33 Too-raugh-he-ah
34 The Fence
35 The Old Mouse
36 Am-ma-choo
37 Eu-chu-lah
38 The Wolf
39 She-Ken
40 Oo-saw-too-take
41 Coo-lu-chu
42 Su-a-ga
43 Treat
44 Little Deer
45 Whip-per-will
46 Six Killer
47 The heirs of Ah-lèach
48 John Welsh
49 The Cat
50 Wallie
51 The Clubb
52 Gideon F. Morriss
53 Ha-ne-lah
54 Sharp Fellow
55 Eunoch, or Trout
56 William Read
57 Old Nanny
58 John Ben
59 Te-gen-tas-ey
60 Wha-a kah, or Grass grows
61 Bell Rattle
62 Smoke
63 Sit-u-wa-kee
64 Tee-las-ka-ask
65 John Hilderbrand
66 Thomas Jones
67 William Jones
68 Drury Jones
69 James Jones
70 Daniel Thorn
71 Peter Johnston
72 Captain John Wood
73 John Shumaker
74 Samuel Key
75 William Key
76 John McNary
77 Heirs of Arthur Burns
78 Joseph Elliott
79 Sutton Stephens
80 Andrew Lacy

81 Giles McAnulty
82 Kar-a-noo-lus-kah
83 William Wilson
84 Nancy Merrill
85 Amos Robinson
86 John Thompson
87 Thomas Harrison
88 James Orr
89 Peggy Shory
90 *Alexander Kell
91 *James Ward
92 *Benjamin Cooper
93 *Uriah Hubbard
94 *Moses McDaniel
95 *James Landrum
96 *David England
97 *George Ward
98 *William England
99 *Catharine Ward
100 *Bryant Ward
101 *Delilah Welsh
102 *Edwad Adair
103 *Samuel Ward
104 *John Terrell
105 *Joel Kirby
106 *John Duncan
107 *Dascob Duncan

FEE SIMPLE.

1 Fox Taylor
2 James Brown
3 Richard Timberlake
4 The Old Bark of Chota
5 James Starr
6 John McIntosh
7 Richard Taylor
8 William Brown
9 David Fields
10 John Brown
11 John Walker, Jr.
12 Elizabeth Pack
13 Elizabeth Lowry
14 George Lowry
15 Robert McLemore
16 Susannah Lowry
17 James Lowry
18 John Benge
19 John Baldridge
20 Thomas Wilson
21 Edward Gunter
22 Richard Riley
23 James Riley
24 Margaret Morgan
25 George Harlin
26 Lewis Ross
27 Richard Walker
28 Yonah, or Big Bear
29 *John Marnin
30 *Peter Linch
31 *Daniel Davis
32 *George Parris
33 *Walter S. Adair
34 Cabbin Smith
35 John Ross
36 Eliza Ross
37 Nicholas Byers
38 John Walker, Senr
39 Samuel Parks

RECAPITULATION.

107 Life Reservations.—39 Fee Simple Reservations.

NOTE.—All those marked * are within the limits of the State of Georgia, being eighteen life estate reservations and five fee simple reservation; and all, or nearly all of them, have been purchased for the State of Georgia, under a provision made by Congress for that purpose.

T. L. McKENNEY.

117-288

Supreme Court of the United States.

October Term 1885.—No. 886.

THE EASTERN BAND OF THE CHEROKEE INDIANS

vs.

THE UNITED STATES AND THE CHEROKEE NATION, COMMONLY CALLED THE CHEROKEE NATION WEST.

In obedience to the suggestion of the court, we print the following:

The provisions of the treaties of 1828 and 1835 which claimant relies on in this case are stated on pages 10, 11, and 12 of the record.

The portions of the treaty of 1846 upon which the claimant relies are printed on pages 12, 13, and 14 of the record. These pages contain all the provisions of the treaty upon which claimant relies, and which are referred to in the brief and oral argument.

The claimant cites in the brief, or read in the oral argument, the following as matter of public history throwing light upon the treaty of 1835, and upon the removal by military force of the Cherokees thereunder, this being cited for the purpose of showing that, owing to the cruelty and injustice involved in that treaty and the removal, it was the design of the treaty of 1846, and the subsequent legislation of Congress, to desist from the further perpetration of such cruelties, and to authorize and legalize the residence of the claimant Indians east of the Mississippi River.

Speaking of the wrongs against the Cherokees in depriving them of their country east prior to the treaty of 1835, Chief Justice Marshall, in The Cherokee Nation *v.* State of Georgia, (5 Pet., 15,) says:

"If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a simple guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant the present application is made."

Speaking of the same cruelties and injustice as are alluded to in the above extract from Chief Justice Marshall, and those involved in and immediately following the treaty of 1835, in the violent removal of the Cherokees in 1837, and about that period in which between two and three thousand Cherokees perished in the removal, Mrs. Helen Hunt Jackson, in her recent work entitled "A Century of Dishonor," at p. 270 says:

"In the whole history of our Government's dealing with the Indian tribes there is no record so black as the record of its perfidy to this nation. There will come a time in the remote future when to the student of American history it will seem well-nigh incredible. * * * (p. 277.)

"Never did mountaineers cling more desperately to their homes than did the Cherokees. The State of Georgia put the whole nation in duress, but still they chose to stay. Year by year high handed oppressions increased and multiplied; military law reigned everywhere; Cherokee lands were surveyed and put up to be drawn by lottery; missionaries were arrested and sent to prison for preaching to Cherokees; Cherokees were sentenced to death by Georgia juries and hung by Georgia executioners. Appeal after appeal to the President and to Congress for protection produced only reiterated confessions of the Government's inability to protect them—reiterated proposals to them to

accept a price for their country and move away. Nevertheless they clung to it. A few hundreds went, but the body of the nation still protested and entreated. There is nothing in history more touching than the cries of this people to the Government of the United States to fulfill its promises to them; and their cause was not without eloquent advocates. When the bill for their removal was before Congress, Frelinghuysen, Sprague, Robbins, Storrs, Ellsworth, Evans, Huntington, Johns, Bates, Crockett, Everett, Test,—all spoke warmly against it, and, to the credit of Congress be it said, the bill passed the Senate by only one majority.

"The Rev. Jeremiah Evarts published a series of papers in the *National Intelligencer* under the signature of William Penn, in which he gave a masterly analysis and summing up of the case, recapitulated the sixteen treaties which the Government had made with the Cherokees, all guaranteeing to them their lands, and declared that the Government had 'arrived at the bank of the Rubicon,' where it must decide if it would or would not save the country from the charge of bad faith. Many of his eloquent sentences read in the light of the present time as prophecies. He says 'in a quarter of a century the pressure upon the Indians will be much greater from the boundless prairies, which must ultimately be subdued and inhabited, than it would ever have been from the borders of the present Cherokee country;' and asks pertinently 'to what confidence would such an engagement be entitled, done at the very moment that treaties with Indians are declared not to be binding, and for the very reason that existing treaties are not strong enough to bind the United States.' Remonstrances poured in upon Congress, petitions and memorials from religious societies, from little country villages, all imploring the Government to keep its faith to these people."

As bearing upon the interpretation of the treaty of 1835 and of 1846, and as tending to show that it was the design of the treaty of 1835 and 1846 to secure to claimant Indians the rights set up in the petition, the claimant introduced Document No. 408, 29th Cong., 1st Sess., the most material parts of which they have italicised, and we here print the part used in the argument by appellant.

29th CONGRESS, 1st Session. } [SENATE.] [408]

MEMORIAL

OF THE

CHEROKEE INDIANS RESIDING IN NORTH CAROLINA,

PRAYING

The payment of their claims, agreeably to the 8th and 12th articles of the treaty of 1835.

JUNE 25, 1846.

Referred to the Committee on Indian Affairs, and ordered to be printed, in connexion with the resolutions of the legislature of North Carolina, on the files of the Senate, relating to the subject.

The memorial of the Cherokee Indians residing in North Carolina to the Senate of the United States,

SHOWETH:

That when the negotiation of the treaty between the United States and the Cherokees was concluded, that portion of the said Cherokees who resided in North Carolina were neither parties to nor represented at the council that negotiated it, but subsequently were induced to enter into an agreement with the Cherokee chiefs, in lieu of a supplement to the treaty, in their favor.

Your memorialists show that, before they would agree to do so, the North Carolina Cherokees specially and emphatically demanded to know of the Commissioner on the part of the United States whether those Indians who might remain in North Carolina were to have, and be entitled, per head, to the same allowance as the Indians who might remove to the west; and, being assured that they would, they became parties to the agreement, and sincerely co-

operated with the United States Government in carrying out the treaty—surrendered their homes, moved to other lands purchased, and submitted to the laws of the State.

Your memorialists, who have remained in North Carolina with the assent of the State, have frequently applied to the executive government to be paid accordingly, because that is the true meaning of the treaty; and in respect to other Cherokees who have remained in some of the other States, the treaty was so construed, and they have been accordingly paid; but the executive government have now reversed that decision upon the meaning of the treaty, and consequently your petitioners are not paid.

Your petitioners have annexed to this memorial THE SHORT STATEMENT OF THEIR CLAIM, AND PROOF IN SUPPORT OF IT, which was exhibited to the Commissioner of Indian Affairs; and he having rejected the same, under the late interpretation of the treaty, it is now respectfully submitted to your honorable body, in order that justice may be done to your petitioners by the action of Congress. For your petitioners do humbly submit that, if they are entitled to be paid by reason of the true interpretation of the said treaty, it is necessary to procure a declaratory act or resolution to reverse the decision referred to. And if such be not the correct interpretation of the treaty, then it is confidently submitted that good faith and honorable dealing by a great nation like the United States, in dealing with a poor and dependent remnant of an Indian tribe, will secure the passage of an act to pay your petitioners, and thereby to secure to them the consideration for which they stipulated, and which they did not doubt would be promptly discharged.

WM. H. THOMAS,
Attorney for the Cherokees east, an adopted Cherokee.

WASHINGTON CITY, June 16, 1846.

CLAIMS OF THE CHEROKEE INDIANS who are remaining in the States of North Carolina, Tennessee, and Alabama, for removal and subsistence allowance under the provisions of the 8th and 12th articles of the treaty of 1835.

The 8th article provides that "such *persons* and *families* as, in the *opinion* of the *emigrating agent*, are capable of *removing* and *subsisting* themselves, *shall be permitted to do so*, and they shall be allowed, in full for all *claims* for the same, *twenty dollars* for each member of their families; and, *in lieu* of their one year's *rations*, they shall be paid the sum of *thirty-three dollars* and *thirty-three cents*, if they *prefer it*."

"ART. 12. Those *individuals* and *families* of the Cherokee nation that are *averse* to a *removal* to the Cherokee country west of the Mississippi, and *are desirous* to become *citizens* of the *States* where they *reside*, and such as are qualified to take care of themselves and their property, shall be entitled to *receive their due portion of all the personal benefits accruing under this treaty*, for their *claims*, *improvements*, and *per capita*, as soon as an appropriation is made for this treaty."

The 8th article limits the amount to be paid on claims for *removal* and *subsistence* to $53.33.

In the commencement of the execution of the treaty, the above articles were construed as authorizing the payment of $53.33 to such of the Cherokees as, in the opinion of the agent and Cherokee committee, were deemed capable of removing themselves or of becoming citizens of the States. The Cherokees who are remaining in the State of Georgia while this construction of the treaty continued, received the amount due them for *removal* and *subsistence* allowance.

Application was subsequently made by the Cherokees remaining in the States of North Carolina, Tennessee, and Alabama, for the payment of the same amount as had been paid to their brethren remaining in the State of Georgia. Payment was refused in consequence of a change of public officers, change of policy, and a different construction placed upon the provisions of the treaty. This makes it necessary, in order to ascertain which construction is right—the ambiguity of the provisions of the treaty having been established by the two constructions placed upon it—to have recourse to well-established rules of interpretation.

1st. Will the language used in the treaty bear a construction which will authorize the payment to the Cherokees remaining in the other States the same sum as was paid to the Cherokees of Georgia?

The term "*due portion*," used in the 12th article, is a term used in dividing estates, and means their *exact dividend* of the proceeds of the sale of the common property. "*All the personal benefits which follows*," limits their share to individual benefits, and exempts from distribution the *twelve hundred and sixty four thousand dollars*, which, out of the proceeds of the sale of the common property, was set apart for the exclusive use of the *emigrants*, (under the 15th article.) "*For their claims, improvements, and per capita*" is used to describe of what the personal benefits consisted. Their *claims* were of two kinds—one for *spoliations* committed upon their property, and the other as a commutation of *removal* and *subsistence allowance*, in lieu of receiving these benefits in kind, which, by the 8th article, was limited to $53.33. The balance of the personal benefits was pay for improvements and per capita.

This construction of the provisions of the treaty is made more plain by having recourse to the original propositions of the Government of the United States upon which the treaty is based.

On the 16th of March, 1835, propositions, acceptable to the Government and to the Cherokee chiefs in favor of a treaty, were drawn up and signed at the city of Washington, which were to be submitted to the Cherokee people for their approval by the Rev. John F. Schermerhorn, a commissioner appointed by the President for that purpose. These propositions were accompanied by an address in favor of their acceptance from President Jackson. The 14th article of the propositions, which made provision for such as desired to remain east, provides that "*those individuals* and *families* of the *Cherokee nation* that *are averse to a removal to the Cherokee country west of the Mississippi*, and are desirous to become *citizens* of the *States* where they *reside*, and such as, in the *opinion* of the *agent*, are qualified to take care of themselves and their property, shall be entitled to receive their *due portion of all the personal benefits accruing under this treaty, for their claims, improvements, ferries, removal, and subsistence.*" (See original, on file in the War office.)

The following instructions in reference to the class ex-

pected to remain east were issued by the Secretary of War to the commissioners appointed to negotiate the treaty:

"The great object being to insure the entire removal of the tribe, no reservations will be granted. If individuals are desirous of remaining, they must purchase residences for themselves."* (Senate document 120, page 102.)

After Mr. Schermerhorn arrived in the Cherokee country, to a council which was convened for the purpose of hearing the propositions of the Government, and accompanying address from the President of the United States, he thus expounded the treaty:

"It makes provision (said he) for such *Cherokees as do not wish to remove west of the Mississippi*, and wish to *become citizens* of the *States*. They shall have paid to them here all that is due them for their *claims*, *improvements*, and *per capita allowance*, *removal*, and *subsistence*; but they must *purchase* their own *lands* like other *citizens*, and settle where they please, subjects of the *laws* of the *country* where they *live*." (See Senate document No. 120, page 459.)

The Cherokees insisted upon reservations being granted in favor of such of their people as might desire to remain east, and finally refused to assent to the treaty unless a provision was added which secured to them their homes. This resulted in a clause being added to the 12th article, which granted *pre-emption rights to each head of a family* who remained east for 160 *acres of land*, to be located in the States of North Carolina, Tennessee, and Alabama, which was the only *change* made in the *original propositions* in reference to the class expected to remain east, as appears by the commissioner's journal of the negotiation that accompanied the treaty. (See Senate document No. 120, page 513.)

Previous to the conclusion of the treaty of 1835 the Cherokee government had ceased to exist, in consequence of the tribe having passed under the dominion of the authorities of the States. The portion of the tribe which resided within the chartered limits of the State of North Carolina, who lived on the lands granted to them by that State in the year 1783, being separated from the portion of the tribe that concluded the treaty, were not

*In addition to these instructions, the President, when the Rev. John F. Schermerhorn went to take leave of him, charged him as follows: "Go, and *do justice to the Indians, justice to yourself, and justice to your country.*" (See Senate document 120, page 453.)

parties to it, nor represented at the council which negotiated it at New Echota, in the State of Georgia. But when it was forwarded to Washington city, for the examination of the President and approval of the Senate, they deemed it proper to employ an agent, who was an adopted Cherokee, to examine its provisions. He did not, however, arrive in Washington until after it had been submitted to the Senate. After examining its provisions, *he was of opinion that the word* claims *in the 12th article was a term of such ambiguous meaning, that, to prevent the liability of a construction being placed upon it which would deprive those he represented of their proportion of the money arising from the sale of the common property, he deemed a supplemental article necessary to define the claims for spoliations, and removal and subsistence allowance, said to be provided for therein.* The friends of the treaty, including the commissioner and chiefs who negotiated it, insisted that it was explained by the term "*all the personal benefits*," which preceded it, and there could be no danger of any construction being given to the treaty which would deprive the Cherokees who remained east of their *removal* and *subsistence* allowance; but to prevent the possibility of a construction being given so foreign from the intention of the parties, an *agreement, signed by the chiefs who negotiated it, would answer the same purpose as desired to be accomplished by the supplement. After the agreement was drawn up it was subjected to the examination of the Senators from the State of North Carolina—the Hon. W. P. Magnum and the Hon. Bedford Brown—who gave it as their opinion that it would answer the purpose desired. It was accepted in lieu of a supplement to the treaty. It bears date at the time it was subsequently signed by such of the chiefs as did not understand the English language, and reads as follows:*

"The delegation, whose names are hereunto subscribed, for the Cherokees who have emigrated to, and are expected to emigrate to their new homes west of the Mississippi, and William H. Thomas, (an adopted Cherokee,) for the Cherokees belonging to, or which shall belong to the following *towns and settlements: Qualla, Alarka, Aquona, Stekosh*, and *Che-o-ih*, with their respective settlements, expected to *remain east*, of the second part:

"ARTICLE 1. *It is admitted that the Cherokees above mentioned are entitled to an equal share proportioned to their numbers in all the lands belonging to the Cherokee Nation of Indians. And, notwithstanding they have been deprived of their*

share of the annuities since the year of 1820, *are nevertheless entitled to all sums in possession of the President of the United States for the use of, and annuities due from, the United States to the Cherokee Nation of Indians; their proportionate share of which benefits was intended to be secured to them by the* 12*th article of the New Echota treaty*, (which is quoted.)

"ARTICLE 3. It is further *agreed to*, that *if any construction be given* to any of the articles of the *New Echota treaty*, whereby the *Cherokees* belonging to, or which shall *belong to* said *towns* and *settlements, shall be depriced of an equal share proportioned to their numbers in all the sums arising from a sale or transfer of the common property, mentioned in the first article of this agreement, payable to the Cherokee Nation of Indians or people, we will request the President and Senate of the United States, and they are hereby requested to allow them such supplemental articles thereto as shall remove such improper constructions, and enable them to receive their equal proportioned share, as above mentioned.*

"ARTICLE 4. It is further understood that *one claim*, to which said *Cherokees desiring to remain are entitled* by the 12th article of the New Echota treaty, amounting the *fifty three dollars* and *thirty-three cents each*, intended to place them on terms of equality with those that *chose to emigrate* in two years from the ratification of the above treaty, who are allowed that sum for *removal* and *subsistence* out of the money arising from the sale of the common property, shall *be placed by them* on interest in the *State Bank of North Carolina*, or some other *safe institution*, to furnish those desiring to emigrate to their new homes in the west with removal and subsistence, without which they might not be able to reach their friends. * * * *Should a division of the lands west of the Mississippi, belonging to the Cherokee Nation as a common property, take place, the above-mentioned Cherokees shall be entitled to have their share laid off for them.*

("Interpreted by Stan Watie)	Major Ridge.
" William Rogers.	Wm. H. Thomas, (for the North Carolina Cherokees.)
Elias Boudinot.	
Johnson Rogers.	James Foster.
George Welch.	Long Shell Turtle.
John Smith, Arkansas chief.	John Fields.
	James Fields.
James Rogers, Arkansas chief.	James Starr.
	Andrew Ross.
John Gunter.	Stan Watie."

Attest: JOSEPH A. FOREMAN.

On the 13th of October, 1837, the Senate passed a resolution calling on the Secretary of War for copies of papers relating to the Cherokee treaty of 1835. On the 12th of January, 1838, a report was made by the Indian Office, in compliance with said resolution. *What purported to be a copy of this agreement*, so far from being a copy, one entire article was left out, without any mark being made to show that any part was not included. And what is still more remarkable is, that the article left out happened to be the explanation, by the chiefs who signed the treaty, of the 12th article of the treaty, in relation to the claims of the North Carolina Indians, being entitled to commutation for removal and subsistence allowance of $53.33 each. (As a *proof* of the correctness of this statement, allow me to refer you to *Senate Doc. No.* 120, *page* 616.) By leaving out that article it was made to appear, in the copies printed for Congress, that the North Carolina Indians not even claimed any commutation for removal and subsistence. There is no proof that the article was intentionally left out to defeat those claims, and it is possible that it was the result of accident; but the effect on the claims of the Indians was fully as injurious as if it had been intentional.

WASHINGTON CITY, February 1st, 1840.

SIR: In reply to your inquiry, I have to state that I was one of the negotiating committee who, on the part of the Cherokees, entered into the treaty of December, 1835, with the Government of the United States, and was also one of a sub-committee appointed by the first mentioned committee to examine said treaty with a view to ascertain whether it was such a one as ought to be signed by the committee of negotiation.

It was the understanding of the parties to this treaty, before it was signed, that there were many families and persons amongst the Cherokees so averse to a removal to the west, that it was deemed politic and just to make the terms of the treaty such as to give perfect freedom of choice to all to go or stay, as they might prefer, excepting such only as might be deemed incompetent to "take care of themselves and property."

This object was never lost sight of. The sub-committee most particularly insisted upon it; and not only upon the liberty of choice, but also upon securing to those who might

prefer to remain a share of the money arising from the sale of the country, equal in every respect (the vested funds excepted) to that secured to the emigrants. I recollect very distinctly that when the 12th article of said treaty was under consideration, the sub-committee objected to it as not being couched in language sufficiently explicit to put it beyond all doubt that those desirous to become citizens of the United States were to receive their *removal and subsistence money*. The commissioner of the United States was appealed to on this particular point; and, in explanation, stated that the words "due portion of all the personal benefits accruing under this treaty" were so comprehensive as to preclude all idea of any interpretation by any one so as to deprive those choosing to remain of their removal and subsistence money. He asked, is this not a personal benefit? If so, it is secured to them beyond a doubt. With this explanation the sub-committee were satisfied, and reported the treaty thus explained to the committee of negotiation. And it was so explained by the commissioner to the people; and, with this explanation, signed and sealed. I have further to state that such a construction as this has been given to this article of the treaty, so far as myself and many others are concerned, who are now, and have always been residing on the east of the Mississippi. We have received our removal and subsistence money.

I am, respectfully, your friend,

WILLIAM ROGERS.

WILLIAM H. THOMAS, Esq.

WASHINGTON, February 3, 1840.

From an acquaintance of many years standing with Mr. Wm. Rogers, the writer of the foregoing letter, I have no hesitancy in saying I consider Mr. Rogers a man of integrity and veracity, and, therefore, any statement coming from him entitled to full credit.

WILSON LUMPKIN.

WASHINGTON, D. C., April 25, 1845.

DEAR SIR: The statement made in this letter by Mr. Wm. Rogers, as far as relates to my observations and expositions of the treaty to the Indians, is correct.

J. F. SCHERMERHORN.

WM. H. THOMAS.

WASHINGTON CITY, January 30, 1840.

SIR: In reply to your inquiries, I will state, unhesitatingly, that I was present when Mr. Schermerhorn, as the commissioner on behalf of the United States, submitted to the Cherokee Indians the propositions on which was based the treaty of the 29th December, 1835, (and had examined its provisions before it was submitted.) He distinctly informed them that such as desired to remain east, and become citizens of the States, would be entitled to receive all the personal benefits of the treaty, including their claims for removal and subsistence. This was at Red Clay council ground, in October, 1835.

After the same treaty was concluded, and submitted to the Senate of the United States for ratification in the spring of 1836, I well recollect that you applied to Mr. Schermerhorn in my presence to know if the 12th article of the treaty secured to the *Cherokees who should remain east* commutation for removal and subsistence allowance of $53.33 each, *with all the other advantages of the treaty;* and his answer was, that on that point there could not remain a doubt, as such was the intention of the parties to the treaty; and on your requesting my opinion on the same subject, I gave it in accordance with that of Mr. Schermerhorn, not then, or now, in the least doubting the accuracy of that opinion.

On obtaining the opinions above stated, you agreed to *withhold a supplement to the treaty* which you had previously prepared, and had deemed necessary, as an explanation for the protection of the interests of the Cherokees in North Carolina, several hundred of whom you at that time fully represented.

All I have stated I should not hesitate to verify in the most solemn form if necessary.

I am, very respectfully,
Your obedient servant,

WM. Y. HANSELL,
Of Milledgeville, Georgia.

WILLIAM H. THOMAS, Esq.,
Of North Carolina.

WASHINGTON, February 3, 1840.

I have long been acquainted with Wm. Y. Hansell, Esq., the writer of the foregoing statement or letter, and con-

sider the statement of Mr. Hansell entitled to credit and respectful consideration.

WILSON LUMPKIN.

WASHINGTON, D. C., April 25, 1845.

SIR: I have examined the foregoing letter of Mr. Hansell, and the statements therein made, as far as relates to what I stated to you in reference to the Cherokee treaty, are true.

J. F. SCHERMERHORN.

WM. H. THOMAS.

WASHINGTON CITY, April 4, 1836.

SIR: My friend, Wm. H. Thomas, is now in this city from North Carolina, where he resides. He is returning from the north, and has stopped here for a short time to ascertain what is doing, or to be done, with regard to the *Indian treaty*. Mr. Thomas is the *agent*, I believe, legally and fairly constituted, for a *part* of the *Cherokee tribe* of *Indians*. I am informed from gentlemen of high respectability that *Mr. Thomas* has for some years past acted as *the agent* of a *part* of the *Cherokees*, and has been very *serviceable* to *them*.

He is entirely satisfied that a *treaty should* be *made* and concluded with the Indians, which shall *guaranty* to that *portion* of the tribe whose *agent he is* their *just* and *equal share* of the *proceeds* of the *sale*. I called, in company with Mr. Thomas, this day, to see you in the War office, but regret to learn you were absent from indisposition.

I have known Mr. Thomas eight or ten years, and have entire confidence in his honest and upright character.

Your humble servant and friend,

JAMES GRAHAM,
Member of the House of Representatives from North Carolina.

Hon. LEWIS CASS,
Secretary of War.

May 8, 1846.—A true copy.

S. H. PORTER,
Chief Clerk Indian Office.

WASHINGTON CITY, April 6, 1836.

SIR: Mr. Wm. H. Thomas, of Macon county, North Carolina, who will hand you this, is, as he informs me, acting as agent for a part of the Cherokee tribe of Indians, and visits this city on business connected with their affairs. I have advised Mr. Thomas to place before you certain papers and information which he informs me he has in his possession, *touching the treaty lately made with that tribe.*

I have not heretofore had the pleasure of a personal acquaintance with Mr. T., but from the representation of others, in whom I have entire confidence, he is a gentleman of fair and respectable standing.

I have the honor to be,
with much respect, &c.,

B. BROWN,
Member of the Senate from North Carolina.

Hon. LEWIS CASS.

May 9, 1846.—A true copy:

S. H. PORTER,
Chief Clerk Indian Office.

The foregoing *agreement and communications were submitted to the Commissioner of Indian Affairs by me on the 4th of July, 1836, accompanied with a request that he would obtain a decision by the Secretary of War on the claims of the North Carolina Indians, referred to in the* AGREEMENT; *in reply to which the following letter was received:*

WAR DEPARTMENT,
OFFICE INDIAN AFFAIRS, July 19, 1836.

SIR: Your communication of the 4th instant has been laid before the Secretary of War, with the accompanying documents, relating to the interest of the Cherokees residing in the State of North Carolina in the treaty of December 29th, 1835.

I am instructed to inform you that it is the impression of the department that the Cherokees in North Carolina have an interest, PROPORTIONATE TO THEIR NUMBERS, *in all the stipulations of that treaty.*

Very respectfully, your obedient servant,

C. A. HARRIS,
Commissioner.

WM. H. THOMAS, Esq.,
Scott's Creek, Haywood, North Carolina.

As bearing upon the defendant's contention that the legislation of the Cherokee Council, which excludes from all participation in tribal property any Cherokee who is absent from the tribe, being binding upon the Government in such sense and degree as that, even where the legislation involves injustice, or is against the policy of the United States, protective of the Indians, yet the legislation of Congress cannot correct or interfere with it, we wish to add to citation at page 35 of our brief, special and specific reference to the Act of Congress of the 3d of March, 1875, (18 Stats., 420, sec. 15,) cited in Elk *v.* Wilkins, 112 U. S., 106. This case is cited in the brief on both sides, and hence this statute is, in effect, already cited in both briefs.

117-2.88

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Supreme Court of the United States.

OCTOBER TERM 1885.

No. 886.

THE EASTERN BAND OF CHEROKEE INDIANS,
Appellant,

vs.

THE UNITED STATES AND THE CHEROKEE NATION,
commonly called THE CHEROKEE NATION WEST.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF AND ARGUMENT FOR APPELLANT.

BY

SHELLABARGER & WILSON,
SAMUEL J. CRAWFORD,
J. H. GILLPATRICK.

THOMAS McGILL & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

October Term 1885.—No. 886.

THE EASTERN BAND OF THE CHEROKEE INDIANS, APPELLANT,

vs.

THE UNITED STATES AND THE CHEROKEE NATION, COMMONLY CALLED THE CHEROKEE NATION WEST.

Appeal from the Court of Claims.

BRIEF FOR THE APPELLANT.

The jurisdiction of the Court of Claims and of this court on appeal is conferred by an act of Congress approved March 3, 1883, (22 Stats., 585,) and that act is in the following words, being part of an appropriation act:

"*Be it enacted in the Senate and House of Representatives of the United States of America, in Congress assembled,* That the Eastern band of Cherokee Indians is hereby authorized to institute a suit in the Court of Claims against the United States to determine the rights of the said band in and to the moneys, stocks and bonds, held by the United States in trust for the Cherokee Indians, arising out of the sales of lands lying west of the Mississippi river, and also in a certain other fund, commonly called the permanent

annuity fund, to which suit the Cherokee Nation, commonly called the Cherokee Nation West, shall be made a party defendant. The said Eastern Band shall within three months after the passage of this act file a petition in said court, verified by the principal chief of said band, setting forth the facts upon which said claim is based. The said Cherokee Nation West shall within six months after the passage of this act file its answer to said petition, and said cause shall proceed to final determination pursuant to the practice in said court, and such rules or orders as the said court may make in that behalf.

"The Secretary of the Interior shall transmit to said court, for the consideration of said court, copies duly certified of all records, reports, papers, and other documents on file in the Department of the Interior which he may deem necessary to said cause or which may be required by either of the parties hereinbefore referred to, and the said parties, respectively may take and submit to said court such additional competent testimony as they may desire. And jurisdiction is hereby conferred upon said court to hear and determine what, if any, interest, legal or equitable, the said Eastern Band has in said moneys, stocks, bonds so held in trust as aforesaid by the United States, and shall enter a decree specifically defining the rights and interests of the said Eastern Band therein, and in any moneys hereafter to be derived from sources similar to those out of which the existing fund arose.

"When the interest, (if any,) of the said Eastern Band has been ascertained as aforesaid, the Secretary of the Treasury shall, out of the portion of said fund adjudged to said parties, respectively, pay all the proper costs and expenses of said respective parties of the proceedings herein provided for, each party, except the United States, to be liable for its own costs and expenses, and the remainder shall be placed to credit of the said Eastern Band and of the said Cherokee Nation, in accordance with their respective rights as ascertained by the said judgment and decree of said court.

"In the said proceeding the Attorney-General, or such of his assistants as he may designate, shall appear on behalf of the United States. Either of the parties to said cause may appeal from any judgment rendered by said

Court of Claims to the Supreme Court of the United States, and the said courts shall give such cause precedence."

In presenting this brief we shall, in the main, confine it to a statement of those propositions upon which the appellant relies for a reversal of the decree of the court below, without any extended elaboration of the argument in support of such propositions, leaving such elaboration, so far as deemed requisite, to the oral argument. But we shall, in addition to stating such propositions, notice with some more detail the grounds upon which, as appears by the opinion in the Court of Claims, that court reached the decree dismissing the claimant's petition.

It is quite essential that, at the outset, we should secure the attention of the court to the matter of what it is that the bill of the claimant and the act under which it is filed do and do not seek to attain, and how far and wherein it seeks to invade the alleged powers and rights of the Government and people of the Cherokee Nation West.

1. The bill does not seek any division or partition of any lands as such.

2. It does not seek the sale of any lands whatever.

3. It does not set up any claim of right in the Eastern Cherokees, whilst such, to interfere with or take part in the government of the Western Cherokees, nor to question the powers or laws of such government, except in so far as they involve maladministration of funds covered by the bill, and which maladministration violates the interests and rights secured by equity, under the treaties, laws, and policy of the United States, to claimants in the common property of the Nation.

4. What the bill does ask is only that, as to the moneys, funds, trusts, annuities, and other property yielding fruits in the way of interest, *per capita* division, or the like, the claimants may have decreed to them such proportionate rights, interests, and equities as, by law and treaty, they

"*had or may have*" (Art. X, 9th Stats., 875) in such common property of the Nation.

5. And the bill further asks that their proportion of interest in the unsold common lands may be ascertained; to the end that, should such lands or any part be hereafter sold, then that the proper proportionate interest which claimants "may have" in the proceeds of such sale, and in the fruits thereof, may be an ascertained and adjudicated one.

This and nothing more is the entire scope of the present claim.

Assignment of Errors.

The appellant for assignment of errors says that the court erred in reaching and rendering the decree which it rendered in this case, in the following particulars:

1. In decreeing "that the claimant has no right in law or equity to any share or portion of the moneys, stocks, and bonds held by the United States in trust for the Cherokees, arising out of the sales of the land lying west of the Mississippi river, nor in and to a certain other fund called the permanent annuity fund, mentioned in the act of March 3, 1883."

2 The court erred in holding that the claimant Indians were, and are, not a part of the Cherokee Nation of Indians within the meaning of the provisions of the treaty concluded between the United States and the Cherokee Nation, on the 29th of December, 1835, (7 Stats., 478,) and in holding that, not being such, they were not entitled to the benefits of the said treaty securing to the Cherokee Nation of Indians the lands and annuities secured to the Cherokee Nation of Indians by said treaty.

3. The court erred in holding that the said last-named treaty of December 29, 1835, or the treaty of March 1, 1836, (7 Stats., 488, being a supplement to the last-named treaty,) or any other treaty between the Cherokee Nation

of Indians and the United States, or any other fact found by the court in this case, had the effect of making the claimant Indians become citizens of the United States or of the State where they reside, or the effect of causing them to cease to be citizens and members of the Cherokee Nation of Indians, or the effect of depriving them of their rights in the common property of the Cherokee Nation of Indians.

4. The court erred in holding that either any or all of the treaties between the Cherokee Nation of Indians and the United States, or any law of the United States, or any constitution, law, ordinance, or regulation of the Cherokee Nation of Indians, or any other fact existing or found in this case, operates to make the failure of the claimant Indians to remove west of the Mississippi river and join the Cherokee Indians there residing, to work an exclusion of the claimant Indians from any rights in the common property of the Cherokee Nation of Indians.

5. The court erred in holding that the claimant Indians are citizens of the United States, and that by becoming such citizens they thereby ceased to be a part of "the whole Cherokee Nation of Indians," and forfeited all their rights of property by reason of becoming such citizens.

6. The court erred in holding that the present place of residence of the claimant Indians, separate from the residence of the majority of the tribe west of the Mississippi river, deprives them of their membership as a part of the whole Cherokee Nation of Indians.

7. The court, whilst holding that the claimant Indians were, at the date of the treaty between the United States and the Cherokee Nation of Indians of the 6th of August, 1846, (9 Stats., 871,) and at the dates of the other treaties, a part of the Cherokee Nation of Indians, and as such entitled to their proportionate share of the proceeds of the sale of the common property of the Cherokee Nation east of the Mississippi river, as provided for in the IXth Article of the last-named treaty, in holding that they were

at the same time not a part of "the whole Cherokee people," within the meaning of those words, as found in Article 1 of said last-named treaty, and were not within the meaning of the same words, to wit, the words "the whole Cherokee people," as found in the 4th Article of the said treaty.

8. The court erred in holding that the court was not bound to recognize and treat the claimant Indians as a part of the whole Cherokee Nation of Indians, although such claimant Indians were and are recognized as a part of the whole Cherokee people and Nation of Indians by the Legislative and Executive branches of the Government.

9. The court erred in holding that the organization of the claimant Indians, as it existed ever since the removal of the majority of the tribe west of the Mississippi river, and up to 1868, and as it existed under and in pursuance of the acts of Congress providing that "hereafter the Secretary of the Interior shall cause the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians," and for "a new roll or census being taken by the Secretary of the Interior," (act approved July 27, 1868, 15 Stats., 228,) and the other acts providing for settling their disputes under the name of the Eastern Band of Cherokee Indians, (22 Stats., 328,) and providing for paying the expenses of their delegates under the same name, and under the act providing for the present jurisdiction, do not establish any band, tribe, or organization of the Eastern Cherokees, of which the courts are bound to take notice, and in holding that these make an organization only for social purposes.

10. The court erred in holding that as against the force of the constitution, laws and treaties of the United States it was within the power of the defendant through its Council to cut off the rights of the claimant Indians as a part of the whole Cherokee people.

We are informed by the brief and argument below of the appellee, and by the opinion of the court below, of the positions they take in resistance to the present claim. In stating the propositions which we now do they are selected and made in view of these positions of our adversary, and each one of our propositions following is meant to meet and answer these positions of the defence, and at the same time to establish the claim of the appellant.

I. CLAIMANT A CIVIL PERSON UNDER LAW.

The appellant, the Eastern Band of the Cherokee Indians, is, and at and before the commencement of this suit was, an organized band of the Cherokee Nation of Indians, so known and recognized by law, and as such is a legal person and entity, enabled and authorized to have and hold property and to bring this suit.

1. See section 3 of the act of July 27, 1868, (15 Stats. 228,) where the statute directs the Secretary to cause the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of *other* tribes of Indians.

2. See section 2 of the same act requiring the secretary to make a new roll or census of these Indians.

3. The act of the 7th of August, 1882, (22 Stats. 328,) directing the employment of "an agent for the Eastern *Band* of the Cherokee Indians in accordance with section 3 of the act of July 27, 1868."

4. In the same last named act the provision directing a "new roll to be made of all the Cherokee Indians residing east of the Mississippi."

5. Same last named act requiring the Secretary to "investigate and report to Congress what in his opinion would be an equitable settlement of all matters of dispute between the Eastern Band of Cherokee Indians" (including all east of the Mississippi) "and the Cherokee tribe or nation west."

6. The act of 18th of August, 1856, (11 Stats. 92,) requiring distribution to Cherokees east of the Mississippi omitted from the Siler roll, the distribution to be according to the principles of the opinion of the Attorney General of April 16, 1851, (5 Opinions 320,) and the other acts making appropriations for the payment of, amongst others, this eastern band of Indians referred to in the second findings of facts, (R. 49.)

7. Act of 23d March, 1883, (22 Stats. 585,) creating the present jurisdiction.

8. Act approved July 15, 1870, sec. 11, (16 Stats. 362,) authorizing the Eastern Band of Cherokee Indians by that name and style to institute suits in courts of United States against Indian agents and their securities, and requiring the Attorney General to prosecute the same.

II. CLAIMANT'S STATUS AS A BAND UNDER LAW RECOGNIZED BY EXECUTIVE.

The *Executive* branch of the Government has also recognized and dealt with this eastern band of Indians as an *organized* band. See—

1. Action of the executive under the above named act of Congress in taking superintendence of the eastern band as of other tribes, as required by the act above named of July 27, 1868—in taking a census of the said tribe or band under the above named act providing for such census—in sending an agent to the said band the same as to other tribes of Indians under the above named act providing for such agency—in paying the expenses of delegates in the above named act providing for such delegates—in paying to them their share of the proceeds of the sales of the common lands east of the Mississippi river, as provided in the above named act of Congress of the 18th of August, 1856, and the other acts of Congress requiring payment to the eastern band of their share of the proceeds last aforesaid.

III. JUDICIARY ACCEPTS STATUS OF TRIBES AS FIXED BY POLITICAL ACTION OF GOVERNMENT.

Whenever the political branch of the Government has recognized and dealt with Indians as such, or as a tribe or a "band" of Indians, there the courts are bound to take notice of and follow such political recognition of the existence of such "band" or tribe, and of the *status* of the members thereof as Indians. "In reference to all matters of this kind it is the rule of this court to follow the action of the Executive and other political departments of the Government whose more special duty it is to determine such affairs. If by them the Indians are recognized as a tribe, this court must do the same."

See United States *v.* Holliday, 3 Wall., 407, 416, 419.
Williams *v.* Insurance Co., 13 Pet., 415, 420.
United States *v.* Forty-three Gallons of Whisky, 93 U. S., 188, 196, *et seq.*
Phillips *v.* Payne, 92 U. S., 130, 132.
Doe *v.* Brandon, 16 How., 635, 657, *et seq.*
Kennett *v.* Chambers, 14 How., 38, 50, and cases cited.
Maguire *v.* Tyler, 8 Wall., 650, 661.
Rhode Island *v.* Massachusetts, 12 Pet., 714.
Luther *v.* Borden, 7 How., 43.
Exchange Bank *v.* McFadden, 7 Cranch, 116.
State of Georgia *v.* Stanton, 6 Wall., 50.
U. S. *v.* Lee, 106 U. S., 196, 209.
Foster *et al. v.* Nelson, 2 Pet., 307.
Scott *v.* Jones, 5 How., 374–3.

IV. POLITICAL ACTION OF GOVERNMENT HAS FIXED CLAIMANT'S STATUS AS ONE GIVING THEM INTEREST IN COMMON PROPERTY.

The political branches of the Government, including the Executive and Legislative, have recognized the claim-

ant Indians not only as an organized band, and a civil entity able to bring this suit, but have recognized them, since the treaty of 1835 and thenceforward, as a part of the "whole Cherokee people" or "Cherokee Nation of Indians," and, as such, entitled to portions of the proceeds of the sales of the common lands of the Cherokee Nation of Indians. This has been done, amongst others, by the following acts of the Legislative and Executive departments:

1. On the question submitted to the Attorney General in 1851, whether these claimant Indians were, notwithstanding their failure to remove west of the Mississippi, entitled, under the above named treaties of 1835 and 1846, to their proportionate share of the proceeds of the sales of the lands belonging in common to the Cherokee Nation, the Attorney General decided that they, the claimant Indians, were so entitled to such proceeds under said treaties.

2. The act of Congress of the 18th of August, 1856, (14th Section, 11 Stats., 92,) expressly affirms "*the principles*" of that opinion, and orders distribution of appropriation for payment of said proceeds of sale of said common lands according to the "principles" of that opinion.

3. Under this act, and other similar appropriations, providing for the payment of said proceeds of said sale, the Executive branch of the Government paid to the claimant Indians their share of said proceeds. (See findings of fact, No. 2 R., p. 49.)

4. The Executive branch of the Government, acting under law, has recognized claimant's organization as a part of the Cherokee Nation, in recognizing and providing for them schools, and otherwise, as set forth in the House Executive Document No. 79, 47 Cong., 2 Sess., and in House Exec. Doc. 169, 43 Cong., 2 Sess., both found as facts in this case. (Rec., 51.)

V. APPLICATION TO CLAIMANT OF PRECEDING PARAGRAPH.

The Legislative and Executive branches of the Government having, as shown in the preceding paragraphs, thus recognized the claimant Indians as an organized band, and having, as shown in the preceding paragraph, recognized them as being still a portion of the Cherokee Nation of Indians, long after they declined to remove west of the Mississippi, and had become a separate organized band, this recognition of them and of their rights to a proportionate share of the proceeds of the sale of the common lands of the Nation, such recognition, by the Executive and Legislative branches of the Government, fixes the *status* of these Indians and determines that they had not ceased to be a part of the whole Cherokee people or Nation, and had not, by failure to remove or otherwise, forfeited their rights in the common property of the whole Cherokee people; and the court is bound to follow this action of the political branch of the Government. (See the authorities cited under paragraph IV.)

VI. FURTHER FACTS AND LAWS FIXING LEGAL STATUS OF CLAIMANT AS PART OF CHEROKEE NATION.

The same conclusion as that stated in the preceding paragraph, to wit, that the failure of the claimant Indians to remove west of the Mississippi did not work a forfeiture of their rights in the common property of the Nation, is shown by other treaties and legislation by Congress and acts of the Executive, as follows:

1. This is shown by the treaty supplementary to the treaty of December 29, 1835, (7 Stats. 478,) namely, the supplement of the 1st of March, 1836, (7 Stats. 488,) which withdraws from the claimant Indians their pre-emption rights as secured by the previous treaties, thus indicating that they were not to become citizens of the State; and the act of Congress of July 29, 1848, (9 Stats. 265, secs. 4 and

5,) expressly recognizes the right of the claimant Indians to remain if they did not "desire" to remove, and shows that no forfeiture by former treaties was intended as the result of failure to remove.

2. The same thing is shown by Article 10 of the treaty of 1846, which in express words preserves to the Cherokees residing east of the Mississippi at the date of the treaty every right and claim which those so residing east had or "*may have*" under the treaty of 1835 and its supplement.

3. The same thing—non-forfeiture owing to failure to remove—is shown in the opinion of the Attorney General above cited, (5 Opinions, 332, 338.)

4. The same thing—non-forfeiture—is shown by the act of Congress of August 13, 1856, (11 Stats. 92,) which ratifies this opinion of the Attorney General and makes distribution to claimant Indians accordingly.

5. The same thing is shown by decision of General Cass, Secretary of War, cited in the letter of Commissioner of Indian Affairs, July 19, 1836, (Sen. Doc. No. 408, p. 9, XXIX Cong., 1st Sess.,) and also by the acts and facts set forth in the facts found below, embodied in the above named House Docs. 79 and 169.

6. The same thing—non-forfeiture owing to failure to remove—is shown by all the facts and acts set forth under the above paragraph IV, and by the action of the Government as stated in other paragraphs.

VII. CONFESSED AND EXECUTED EFFECT OF ARTICLE 9 RESULTS IN ESTABLISHING CLAIMANTS' RIGHT IN ALL OTHER COMMON PROPERTY.

Since it is confessed by the defendant, and was held by the Court of Claims in this case, that in 1846, at the date of the treaty of that year, the claimant Indians were a part of "the whole Cherokee people" for the purpose of

receiving the *per capita* division of the proceeds of the sale of the common lands of the Nation, which division is provided for in the 9th article of the treaty of August 6, 1846, (9 Stats., 875,) and since the political branches of the Government have executed that article in accordance with this view, and since, moreover, the concluding paragraph of said 9th article *expressly* shows that the claimant Indians were entitled to such *per capita* division, and were, for the purposes of such division, a part of the Cherokee Nation residing east at the date of the treaty of 1835, it is therefore fixed in the case that this 9th article took in and embraced, as a part of "the whole Cherokee people," these claimant Indians.

From this it results that (1) at that date the claimant Indians were not treated or regarded by the treaty of 1846 as citizens of the United States or of the State of North Carolina in such sense as to deprive them of their rights as Cherokees. (2) That they had then forfeited no rights by reason of non-removal or otherwise.

VIII. Scope of words "whole Cherokee people" in Article 1.

When article 1 of the treaty of the 6th of August, 1846, (9 Stats., 871,) provides "that the lands now occupied by the Cherokee Nation shall be secured *to the whole Cherokee people for their common use and benefit*," it takes within its purview and within the scope of the words "the whole Cherokee people" the claimant Indians, because, as shown in other paragraphs, the 9th article of the same treaty regards and treats them as a part of the whole Cherokee people.

IX. Scope of the words "whole Cherokee people" in 4th Article.

For the same reasons stated in the last preceding paragraph VIII the words in the 4th article of the treaty last

named (bottom of page 873, 9 Stats.,) which provides that the lands of the Nation therein named "*shall be and remain the common property of the whole Cherokee people*," it results that these words secure to the claimant Indians, as a part of "the whole Cherokee people," their proportionate share in these common lands. This necessarily follows, because, where it appears by a treaty or a statute, that important words have fixed upon them an admitted or clear sense, in one part of the treaty or statute, it will be held that these words are employed in the same *sense* throughout that same instrument, unless applied to a different subject-matter, or unless the context forbids.

The substance of this rule of interpretation, as stated by the authorities, is that where the same words or set of words or phrases are repeatedly used in such treaty, statute or other documents, and are applied to one and the same subject-matter, or subject-matters substantially identical, then and in every such case, the words and phrases shall be construed to have been employed in the same sense and to have the same scope and significance, unless something in the context plainly shows such similar words and phrases to have been used in different senses. Dwarris expresses this rule in the following words:

"If the same words occur in different parts of a statute or will, they must be taken to have been used everywhere in the same sense."

Potter's Dwarris, 194.

The language of the Chief Justice of King's Bench in Reg. *v.* Commissioners, 6th A. & Ell., 68, 69, is as follows:

"We disclaim altogether the assumption of any right to assign different meanings to the same words in an Act of Parliament, on the grounds of a supposed general intention in the act. We think it necessary to give a fair and reasonable construction to language used by the legislature, but we are not to assume the unwarrantable liberty of varying the construction for the purpose of making the act consistent with any views of our own."

This word "whole," as applied to the entire Cherokee people or Nation, is invariably used, when qualifying the words "Cherokee Nation" or the words "Cherokee people," to embrace the entire people of the tribe, including the claimant Indians.

1. It is so used in Article 1 of the treaty of July 8, 1817, (7 Stats., 157,) in making cession of lands to the United States.

2. It is so used in Article 2 of the same treaty, (7 Stats., 157,) making further cession of lands to the United States.

3. It is so used in Article 4 of the same treaty, (7 Stats., 158,) providing for dividing the annuity between the two parts of the Cherokee Nation then residing respectively east and west of the Mississippi river.

4. The Article 5 of the same treaty expressly recognizes the division of the Nation or tribe into two parts, but as constituting *one* Nation. (7 Stats., 158.)

5. The word "whole" is so used in the 10th Article of the same treaty, providing for cession to the United States of reservations as embracing the entire Nation, wherever residing. (7 Stats., 159.)

6. And as above shown, it is *admitted* that Article 9 is one embracing within its provisions, as part of this "*whole Cherokee people*," *the claimants*.

X. The treaty and legalized sense of treaty of 1835.

Another view of the provisions of Articles 4 and 9 of the treaty of the 6th of August, 1846, (9 Stats., 871; see petition, R., pp. 12, 13 and 14,) establishes another proposition of the claimant in the case, namely, that the treaty of 1835 ought to and by its true meaning does secure to the entire Cherokee people, including the claimant Indians, their equal and proportionate interest in the common property of the Nation, and was so meant; but by mistake did not, except inferentially, provide for an in-

terest in the lands east to those residing west. It will be observed that the substance of the recitals of Article 4 is that the whole Cherokee Nation, including those then residing east and those residing west of the Mississippi river, were entitled to a common property in the lands ceded to the old settlers by the treaty of 1828, and became the "common property of the whole Cherokee Nation" by the operation of the treaty of 1828. And, further, that this fact resulted, in equity, in securing to the old settlers west of the Mississippi river in 1828, a common interest in the lands east of the Mississippi ceded to the United States by the treaty of 1835, and that the treaty of 1835 was meant to and ought, and by its true meaning does, secure to each part of the tribe, that east and that west, in proportion to their respective numbers, a common interest in the common property of the whole Cherokee Nation and in the general funds of the Nation.

It will be further observed that the concluding paragraph of article 9 of the same treaty of 1846, in providing for the distribution of this common property of the whole Cherokee Nation, spoken of in article 4, expressly includes within that Nation "all the Cherokees residing east of the Mississippi at the date of the treaty of 1835 and its supplement" of 1836—this 9th article being one devoted to making that equitable division of the proceeds of the sale of common lands which the recitals of article 4 show ought to have been explicitly made by the treaty of 1835. It is thus expressly fixed upon the face of this treaty by its very terms—

(1) That it, in making this explanation and correction of the designs of the treaty of 1835, embraces within this correction and this division, along with the others of the tribe, the claimant Indians; and it was held by the court below, and admitted by the defendants, that the claimant Indians were so embraced within article 9.

(2) This further establishes that the treaty of 1846 was and is one which *dealt with the condition of the tribe as it existed in* 1835 *at the date of the treaty of that year; that in this regard the treaty of* 1846 *was retrospective and dealt with the division of the tribe into two parts as it existed at the date of the treaty of* 1835, and not merely as divisions existed in 1846; and this view completely and expressly negatives the view of the court below, that the treaty of 1846 excluded from its purview the Indians then residing east of the Mississippi river, and *only* dealt with the three parties named in the title of the treaty of 1846, to wit, with those then residing west who, in 1835, were divided into three divisions known respectively as the old settlers, the Ross or Government party, and the Adair or treaty party.

XI. WHY TREATY OF 1846 ONLY DIVIDED PROCEEDS OF SOLD LAND.

Another proposition of the claimant is expressly vindicated by these articles 4 and 9 of the treaty of 1846, and it is, that the failure of the treaty of 1846 to make provision for the division of the common property of the whole Cherokee people, including their lands, was not because, as the court below held, that the entire Cherokee people had no interest in the lands, but was because there was nothing *then* besides the balance of the proceeds of the sale of their lands that was capable of division. The treaty expressly declares that both the land and the proceeds of that sold by the treaty of 1835 for $5,000,000 were the common property of the entire Cherokee people, and it divides the proceeds, these being *all* then susceptible of division, to the entire people, including the claimant Indians, and it leaves the lands undivided for the manifest reason that they were then, consistently with the purposes of the treaty, indivisible, and were, until sold, designed to remain the common property of the Nation.

XII. PROCEEDS OF SALES TREATED AS DIVISIBLE COMMON PROPERTY.

Still another proposition of the claimant is also by articles 4 and 9 expressly established, to wit, that it was the design of these treaties that, *whenever* a sale of the common property of the entire Cherokee people should occur, their common rights, which had attached to the lands before sale, should *attach to the proceeds of the sales of the common lands whenever such sales should occur*. There is nothing in *any* treaty which expressly provided that, when a sale of the lands belonging to the entire Cherokee people should occur, the rights of the entire people, in the money arising from the sale of such lands, should attach *pro rata* to such proceeds; and yet articles 4 and 9 of the treaty of 1846 expressly covenant and secure to the *entire* Cherokee people, including, (as is decided by the court below, by the acts of Congress in making distribution of the $5,000,000, and also confessed by the defendant,) claimant Indians, a common interest in the proceeds of the sale of the common lands east.

The same rule entitles the claimants to their *pro rata* share of the sales of the common lands west whenever such sales occur.

XIII. MONEY, ADMITTED TO BE COMMON PROPERTY, BOUGHT "NEUTRAL LANDS."

There is another view of this treaty of 1846 which is equally conclusive of the rights of the claimant Indians in the lands and annuities covered by the petition. It is this: it is admitted by the defendant, and was decided by the court below, that we were entitled to our *pro rata* share of the $5,000,000 produced by the sale of the common lands east under the treaty of 1835. A portion of that $5,000,000, in which we are admitted to have had a common interest, was, by the 4th and 9th articles of the

treaty of 1846, devoted to the purchase, for the tribe, at the price of $500,000, of the land described in the 9th article as the "additional quantity of lands ceded" (by Art. 2 of the treaty of 1835) "by the United States to the said Nation." This additional quantity of land is what is known as "the neutral land." It afterwards was sold for the use of the tribe under the treaty of 1866, (see Holden *v.* Joy, 17 Wall., 211,) and is part of the land and money covered by the petition. To hold that the claimant Indians were entitled to no part of these "neutral lands" or their proceeds is to hold that, *although* they owned their part of the *money* paid by the United States for those lands, yet they are entitled to no part of the proceeds of the sale thereof. This contention flies in the face, not only of manifest and conclusive *right and equity*, but in the face of the express provisions of the 4th and 9th articles of the treaty of 1846, which expressly interprets and fixes the the legal meaning of the treaty of 1835, and secures to the claimant Indians the application of this precise equity.

XIV. ARTICLE 10 OF TREATY OF 1846 SECURES CLAIMANTS THE RIGHTS GIVEN BY ARTICLE 4 OF SAME TREATY, AS SUCH ARTICLE 4 INTERPRETS FORMER TREATIES.

Our next proposition is one conclusive of the whole case, as we submit. It arises out of the construction of Articles 4 and 10 of the treaty of 1846. An analysis of article 4 (in part already stated) shows this: That the "board of commissioners recently appointed by the President of United States to examine and adjust the claims and difficulties existing against and between the Cherokee people and the United States, *as well as between the Cherokees themselves*, had decided that under the provisions of the treaty of 1828, as well as in conformity with the general policy of the United States, the Western Cherokees had no *exclusive right* to the territory ceded in that treaty to the

old settlers or Western Cherokees, but that the same was intended for the use of and to be the home for the whole Cherokee Nation, including those east as well as those west; and further decided that the territory west became the common property of the whole Cherokee Nation by the operation of the treaty of 1828, and that by the equitable operation of the same treaty those west acquired a common interest in the lands east of the Mississippi, as well as those occupied by themselves west."

This 4th article then declares that this last interest, to wit, the interest of the Western Cherokees in the lands east, had not been provided for by the treaty of 1835, except in so far as they, as a constituent portion of the Nation, retained in proportion to their numbers a common interest in the country west of the Mississippi and in the general funds of the Nation. This is tantamount to a declaration that by the treaty of 1835 the Cherokees who then resided, in 1835, east of the Mississippi river had a common interest in the lands west of the Mississippi river, and that that common interest was provided for by the terms of the treaty of 1835; but that the treaty of 1835 failed to expressly provide for the corresponding interest of the Western Cherokees or old settlers in the lands east of the Mississippi river, but the treaty of 1835 had failed *only* in the respect that it did not secure, by its terms, to those west of the Mississippi their interest in the lands east.

This therefore is a treaty declaration that the Cherokees east and the Cherokees west had a common interest in all the lands both east and west and in the general funds of the Nation. All of this was secured to these Indians east and west by the treaty of 1835, excepting that the interest of the Western Cherokees in the lands east had not been *expressly* provided for, and it was this interest of the Cherokees west in the lands east that the treaty of 1846 in the 4th article was taking care of and securing to those west.

Now, it is an historical fact, and likewise a fact appearing

by the record in this case, that when the treaty of 1835 was made there were more Cherokees, of which claimants were a part, residing east of the Mississippi river than there were residing west. It is an historical fact, and likewise a fact appearing by the record in this case, that between 1835 and 1846 a large number of Cherokees had removed to the west, but there were Cherokees yet remaining east of the Mississippi, and the treaty of 1835 having, as above shown, secured to those east a common interest in the lands both east and west, and a large number of those who were east in 1835 having gone west, but there still remaining a portion of the Cherokees in the country east, (*i. e.* in 1846,) therefore it was necessary in order to make the intent and purpose of this treaty plain, and in order that there should be no misapprehension as to the effect of the treaty upon those who were still remaining east, that the 10th article of the treaty of 1846 should be inserted, which provides:

"It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees *now residing* in States east of the Mississippi river had or *may have* under the treaty of 1835 and the supplement thereto."

This is a plain provision that the Indians who resided east of the Mississippi in 1846 should have preserved to them the rights they had under the treaty of 1835, which last-named treaty, as we have above seen, secured to them, as then composing a part of the majority residing east, a common interest in this common property. And please observe that the meaning fixed by the treaty of 1846 on that of 1835 is made by that of 1846 to be its true and binding legal sense, and that it is that sense it *must receive in interpreting the reference to it in Article X.* It results from this:

1. That, by the treaties of 1828 and 1835, the Eastern

Cherokees were secured a common interest in the common property, both east and west.

2. That, by the treaty of 1846, the Western Cherokees or old settlers were secured a common interest in the property east, which had been omitted to be expressly secured to them by the treaties of 1828 and 1835.

3. That the treaty of 1846, by its tenth article, expressly recognizes those who had not then removed to the west, but were still remaining east, as being a part of the Cherokee Nation.

4. That this Article X studiously and carefully preserves to the Indians at that time residing east their common interest in this property, so secured to them by the treaty of 1835, *and interpreted by the treaty of* 1846 *as securing the same to them*, and this by providing that nothing in the treaty shall be so construed as to take away or abridge any of their rights under the treaty of 1835.

5. That the residence of the Cherokees east was not regarded by the parties to that treaty as having made them citizens of another State, nor that for any reason they were then such citizens, or aliens to the Cherokee Nation, as that by such citizenship or alienage they had ceased to be a part of the Cherokee Nation.

XV. EXTRINSIC FACTS FIX MEANING OF THE WORDS "WHOLE CHEROKEE PEOPLE."

If the foregoing considerations, based upon the face of the treaty of 1846, left it doubtful as to whether the words in that treaty—"the whole Cherokee people"—embraced within their scope the Cherokee Indians then residing east of the Mississippi river, then such doubt would be removed by placing the court in the same position in which the parties to that treaty, including the Senate, were at the time that treaty was negotiated and ratified.

Some of these considerations, extrinsic of the face of the

treaty, and which throw light upon the meaning of the words "the whole Cherokee people," which were known to both parties and had in view at the time those words were employed in the treaty, are as follows:

1. It is admitted and was found by the court below (R., p. 48,) that at the date of that treaty twelve hundred of these Cherokee Indians were then residing east of the Mississippi river.

2. When the subject-matter of passing a law making a treaty with the Cherokee Nation was pending before the Executive departments of the United States, to provide for the settlement of the existing controversy between the different portions of that tribe, to wit, upon the 12th day of April, 1846, the President of the United States sent to the two Houses of Congress a special message upon this subject, communicating to the Houses the views of the President regarding the same, and transmitting therewith a communication from the Secretary of War, dated April 11, 1846, together with a communication to the Secretary from the Commissioner of Indian Affairs, dated March 31, 1846. This message, with the accompanying documents, is found as a fact in this case, (see R., p. 57,) and is Senate Document No. 298, 29th Cong., 1st session.

In that message it will be seen the President alludes to the feuds which existed between different parts of the tribe, the murders and disorders committed, recommends to Congress the passage of a law, either dividing the country which the Cherokees at present occupy west of the Mississippi, or providing a new home for one or other of the bands or parties now in hostile array against each other, and a division of their annuities, and adds these words: "There is still a small number of the Cherokee tribe remaining within the State of North Carolina, who, according to the stipulations of the treaty of 1835, should have emigrated with their brethren to the west of the Mississippi

river. It is desirable that they should be removed, and in the event of a division of the country in the west or of a new home being provided for a portion of the tribe, that they be permitted to join either party as they prefer and be incorporated with them." (See page 2 of above document No. 298.)

On page 16 *et seq.* of the same document these Cherokees residing in North Carolina are, by the Commissioner of Indian Affairs in the communication forwarded to Congress by the President with his said special message, (p. 16,) named as "the Cherokee Indians yet remaining in North Carolina," and their rights are discussed and their right to share in the benefits of the previous treaties equally with the other Cherokees is expressly declared.

Both the President's message and this letter of the Commissioner of Indian Affairs expressly, distinctly and unmistakably recognized these North Carolina Indians as then being a part of the Cherokee Nation, or the whole Cherokee people, and as such entitled to their share of the common funds of the Nation, and in the lands of the Nation, but both recommend their removal west of the Mississippi river. The fact that these papers contemplate and urge their removal west is not the present point of inquiry, but the point is whether the treaty of 1846, viewed in the light of facts extrinsic of the treaty, regarded and treated these claimant Indians as a part of the whole Cherokee people; whether the failure to remove west has forfeited rights secured to them by their being included within the words of the treaty of 1846, "the whole Cherokee people," is a separate question, to which we will allude, and have already alluded, in other paragraphs.

It must be carefully observed that this message of the President was a special one devoted to this single subject-matter; that it and the accompanying documents formed the basis of the treaty of 1846, and that the 4th article of that treaty (7 Stats., 873) expressly appeals to and attempts

to vindicate "the general policy of the United States in relation to Indian tribes, and the Cherokee Nation in particular," such policy being indicated in this message of the President, and that this message and accompanying papers led to the formation of the treaty of 1846. Since therefore this message and accompanying documents expressly take in these claimant Indians as then being a part of the whole Cherokee people, it is impossible to assume that the claimant Indians were not embraced within those terms.

3. Senate Document No. 408, 29 Cong., 1 sess., (and in House Ex. Doc. 79,) is another fact found in the case. It is found in a volume entitled "Senate Documents, 1 sess., 49 Cong., vol. 8, 1845–46." This is a memorial of the Cherokee Indians residing in North Carolina. It is transmitted to the Senate by William H. Thomas, attorney for the Cherokees East, and is dated June 16, 1846, a little more than a month before than treaty was agreed upon. In this memorial is embodied an agreement between Thomas and 15 delegates for the Cherokees, who had theretofore emigrated or expected to emigrate west of the Mississippi. The face of this memorial shows that the terms of this agreement were agreed upon before the Senate ratified the treaty of 1846; that it was submitted, unsigned, to the two Senators from North Carolina, Mr. Mangum and Mr. Brown, for the purpose of ascertaining whether the agreement would secure the same rights to the North Carolina Indians as would be secured by an additional article to the treaty, securing the same right to the North Carolina Indians as purport to be secured by this contract, and such Senators gave their opinion that it would do so; and it was thereupon "accepted in lieu of a supplement to the treaty," the memorial adding "it bears date at the time it was *subsequently* signed by such of the chiefs as did not understand the English language, and reads as follows."

Then follows the agreement on pages 4 and 5 of Senate

Document 408, and see this agreement, in full, in said House Document 79, pp. 7 and 8.

It will be noticed that article 1 of the agreement declares that the " Cherokees above mentioned [the North Carolina Cherokees] are entitled to an equal share, proportionate to their number, of all lands belonging to the Cherokee Nation of Indians." Also in all sums of money in possession of the President of the United States for the use of, and annuities due from the United States to, the Cherokee Nation of Indians, their proportionate share of which benefits was *intended* to be secured to them by the 12th Article of the treaty of New Echota. It further provides that if any construction is given to the treaty of New Echota whereby these claimant Indians shall be deprived of an equal share proportioned to their number of the sums arising from the sale or transfer of the common property mentioned in the first article, (to wit, the lands,) then that they would request the President and Senate to allow them such supplemental article thereto as shall remove such improper construction, and enable them to receive their equal proportionate share as above mentioned. It also provides that they who desire to remain in North Carolina should be entitled, by the 12th Article of the treaty of New Echota, to the benefits of the $33.33 secured by that article, and further provides that should " *a division of the lands west of the Mississippi, belonging to the Cherokee Nation as common property, take place, the above-mentioned Cherokees shall be entitled to have their share laid off to them.*"

It appears also, by this document, that owing to this agreement being so agreed upon and approved by the N. C. Senators before the treaty was ratified, though *signed thereafter*, all opposition to the treaty of New Echota was withdrawn, and that the North Carolina Indians aided in securing its passage.

It is thus made to appear that not only was this document, though at that time unsigned, laid before the Senate

whilst the treaty of 1846 was pending before it, but that the Senators representing the State of North Carolina had their attention especially called to it, gave their opinion in regard to its effect, and gave assurance that it secured to the North Carolina Indians the rights which it purported to cover.

In the light of these two extrinsic facts now stated, namely, the message of the President to the Senate, and this memorial of the North Carolina Cherokees, it is simply impossible to deny that the words "the whole Cherokee people," as employed in the various articles of the treaty of 1846, were meant to and do include these North Carolina Indians. The court below regarded the *ex-parte* statement of Thomas not only *competent* evidence to give meaning to the treaty of 1835, but as throwing "*much light*" on it, but treated the solemn contract, signed by both Thomas and the delegates who made the treaty, as totally incompetent to explain the meaning of either that of 1835 or that of 1846, though before the Senate when each was made. (R., 60 and 61.)

XVI. In construing the treaty of 1846 and the other treaties brought under review in this case, wherever any terms of such treaties are doubtful, it is competent and proper for the court to place itself in the position which the Senate and other parties to such treaties were placed at the time of making the same.

Doe, Dem. Clark *et al. v.* Braden, 16 How., 635.
Aldrich *v.* Williams, 3 How., 24.
Preston *v.* Browder, 1 Wheat., 120.
Fabbri *v.* Murphy, 95 U. S., 196.
U. S. *v.* Union Pacific R. R. Co., 91 U. S., 79.
Canal Co. *v.* Hill, 15 Wall., 100, 101.
Mobile & Montgomery R. Co. *v.* Jurey, 111 U. S., 584, 592, and cases cited.
Barreda *v.* Selsbee, 21 How., 146, 161.

If the words "the whole Cherokee people" are doubtful as to what Indians are included within them, then such ambiguity is a latent one, and all the familiar authorities admitting extrinsic evidence to explain latent ambiguities here are applicable, and admit as evidence the above-named special message and the North Carolina Indian memorial.

XVII. CLAIM IN PETITION DOES NOT INVOLVE BREAKING UP UNITY OF CHEROKEE NATION OR NATIONAL PROPERTY.

The contention of the defendant below and the holding by the Court of Claims, that to allow to the claimants their proportion of the proceeds of the sale of the common lands and their share of the commuted annuities would, in this case, result in establishing a rule by which any portion of the tribe might withdraw from the tribe, scatter into different States and countries, claim their proportion of the common property, and thus break up the national funds of the Cherokees and their common property into fragments without the consent of the Cherokee Nation and without the consent of the United States, is not well founded, for the following reason:

The claim of the eastern band is founded upon the authority of the treaties with the Cherokee Nation and of the United States, securing to them their proportion of an interest in the common property of the Nation, this interest being thus secured to them in their condition and at the place of their present separate and, by law and treaty, authorized residence. And, hence, allowing to them the claims set up in the petition would not be a sanction or authorization of any partition of the common property to any Indians departing from the tribe, where no treaty or laws sanctioned such departures.

This authority, derived from the treaties with the Cherokees and from the laws of the United States and the action

of the Executive, is shown by the same treaties, statutes, and other acts to which we have referred in the foregoing paragraphs, going to show that the claimant Indians, long after the removal of the majority of the tribe at and even after the treaty of 1835 to the west, and whilst the claimants were in the *same* place where they now are, were recognized by these treaties, laws, and other acts as entitled *to remain where they are, and at the same time entitled to their proportion of the common property of the Nation.*

A recapitulation of the treaties, acts of Congress, and executive acts, establishing this right of the claimant Indians, notwithstanding their residence east of the Mississippi and separate from the rest of the tribe, to be regarded as continuing to be a part of the Cherokee Nation and entitled to their share of the common property, may be stated as follows:

1. The treaty of 1846, and especially of articles 4, 9 and 10, expressly so recognized their right in securing to them as confessedly a part of "those Cherokees residing east at the date of the treaty of 1835 and the supplement thereto."

2. The act of Congress of the 29th of July, 1848, (Sec. 5, 9 Stats., 265,) expressly recognizes their right to remain if they did not desire to remove.

3. The opinion of the Attorney-General of April 16, 1851, (5 Opinions, 332, 333,) expressly holds and decides that they were entitled to their proportion of the proceeds of the common lands sold by the treaty of 1835,—this in 1851, and that our failure to remove deprived us of none of these rights.

4. The act of Congress of August 18, 1856, (11 Stats., 92,) expressly ratifies and enacts into law the principles of this opinion.

5. The other acts of Congress appropriaating for the payment to the claimant Indians of their proportion of the proceeds of the sale of the common lands cited in the

findings of fact No. 2 by the Court of Claims, (R., p. 49,) show the same thing.

6. The payment by the Executive of this *per capita* to the claimant Indians in the years 1851, 1852, and thenceforward, shows the same thing, and all the other Executive acts above named, as, for example, those set forth in House Documents Nos. 79 and 169.

7. The above cited act of Congress of July 27, 1868, (15 Stats., 228,) in requiring the Secretary of the Interior to "cause a new roll or census to be made of the North Carolina or Eastern Cherokees," recognizes and legalizes the separate organization and existence of the band or tribe; and the provision of the 3d section of the act requiring the Secretary to cause the Commissioner of Indian Affairs to take the same supervisory charge of the eastern or North Carolina Cherokees as of other tribes of Indians, expressly legalizes and authorizes their separate residence and organization, and also makes them a portion of the "Cherokee Indians in their place of separate residence."

8. The other acts of Congress above cited, providing for a census of this tribe, providing for the Secretary's investigating the differences between them and the Western Cherokees, providing for paying the delegates' expenses from the tribe to Washington, providing for sending to them an Indian agent, authorizing the band to sue in the United States courts, etc., are all distinct legislative recognitions of their right to retain their present residence and to be regarded as a portion of the Cherokee Nation, notwithstanding such separate residence.

9. The same thing, to wit, the legalization of their residence where the claimant Indians now reside, and the retention of their character and rights as a part of the Cherokee Nation, is shown by the fact that, under authority of law, the lands where they now reside are held in trust by

the Government of the United States in virtue of a deed for the land where they reside to the Commissioner of Indian Affairs.

XVIII. INDIAN TRIBES AND TRIBAL PROPERTY SUBJECT TO JUST CONTROL OF THE UNITED STATES.

A vital error of the court below, (R., 67,) is in ascribing to the laws and government of the Cherokee Nation, passed in regard to who alone should be members of that Nation, and as to who should be entitled to participate in the common property of the tribe, or passed in alleged attempts to define rights in such common property derived under treaties, a conclusive force which puts such matters so covered by the legislation of the Cherokee Council beyond the corrective control of the Government of the United States.

Regarding this point our proposition is this:

That all legislation by the Cherokee Nation relating to tribal affairs, such as who are entitled to be regarded members of the tribe, and as such entitled to share in the tribal or common property, or as to what the treaties require regarding, or make to be, such common property, or as to the administration of such tribal property, is under the corrective supervision and control of the Government of the United States; and that, in virtue of such supervisory control, all such Cherokee legislation can and ought to be corrected by the Government when it embodies anything which such Government, in the exercise of its supreme and plenary power over such subject-matters, shall decide to be maladministration. And our proposition is further, that in all matters *political* in their character this corrective control of the Government is exercised through Congress, or the treaty power, or the executive, or the three together; and in all matters judicial in their nature it is exercised through the courts.

Applied to the present case this proposition means that if the Cherokee laws exclude from membership in the Cherokee Nation those whom the treaties or laws of the United States, or the executive, acting under such treaties and laws, have recognized as such members, then such recognition is controlling in the courts and works a repeal of the maladministration of the Cherokee Council; or if such Council passes laws as to the disposition of the common property of the tribe, which exclude a portion of that Nation so recognized by the Government of the United States from participation in the common property, then the Government may, and ought to, correct this maladministration in virtue of this supreme and plenary power so retained over all the Indian tribes.

In support of this proposition as to the retention, by the Government, of such plenary authority, we cite the following cases:

Mackey *v.* Coxe, 18 How., 100.
United States *v.* Rodgers, 4 How., 567.
The Cherokee Tobacco, 11 Wall., 616.
United States *v.* McBratney, 104 U. S., 621, 623.
Elk *v.* Wilkins, 100 U. S., 99, 100, and cases cited.
Ex parte Crow Dog, 109 U. S., 156.
United States *v.* Holliday, 3 Wall., 409–419.
United States *v.* Payne, 4 Dillon, 387, and cases cited, p. 389.
Kansas Indians, 5 Wall., 756, 757.
Fellows *v.* Blacksmith, 19 How., 371.

XIX. Fifth article of treaty of 1835 protects claimants against unconstitutional tribal legislation.

But if it were not true that Congress and the Government necessarily retain plenary power to legislate as against the laws passed by an Indian tribe attempting to deprive a portion of the tribe of rights in the common property,

or of citizenship, by reason of residence in North Carolina, yet this power is expressly reserved by the 5th article of the treaty of 1835, (7 Stats. 481,) because that section expressly excepts from the power of the Cherokee Nation the power to pass any law inconsistent with the Constitution of the United States. The Constitution of the United States makes the treaties of the United States the supreme law of the land. The treaty of 1828, as we have seen in the above paragraph No. XIV, (and see article 4 of the treaty of 1846, 9 Stats. 873,) secured to (amongst others) the claimant Indians their *pro rata* share of all the lands of the Cherokee Nation, and the 4th and 9th articles of the treaty of 1846 so explain and modify the previous treaties of 1828 and 1835.

To hold therefore that it was competent for the Cherokee Nation to pass laws which would deprive the claimant Indians as a part of the whole Cherokee people of their character as members of the Cherokee Nation and of the property secured to them by the treaties of 1828, 1835 and 1846, would be to authorize the Cherokee Council to pass laws in contravention of the Constitution making treaties the supreme law of the land.

XX. GEOGRAPHICAL LOCATION DOES NOT FIX LEGAL STATUS OF INDIANS.

The mere matter of location or geographical position of the claimant Indians, separate from the body of the tribe, taken by itself, has no tendency to deprive them of their character as Cherokees.

Fellows *v.* Blacksmith, 19 How., 366, 371–2.

XXI. TREATY OF 1846 MADE FOR, IS THE ACT OF, AND INCLUDES ENTIRE TRIBE WHEREVER LOCATED.

The proposition of the court below (R. 63–64) that the treaty of August 6, 1846, (9 Stats., 871,) did not embrace

the entire Cherokee Nation or tribe of Indians, because of the fact that a title set at the head of that treaty declares it to have been made on the part of the Indians by (1) John Ross, principal chief of the *Cherokee Nation*, (2) by eight named delegates "duly appointed by the duly constituted authorities of the *Cherokee Nation*," (3) by six persons named, being a delegation appointed by the "treaty party," and (4) five delegates appointed by that part of the tribe known as "old settlers," is totally without foundation, because—

1. The preamble of the treaty shows that it was a treaty between the United States and the "Cherokee Nation of Indians."

2. The entire scope of the treaty shows by express terms that it was meant to embrace and bind the "whole Cherokee people," and that in Article X of that treaty claimants are expressly named and included and their common rights of property preserved.

3. The *testatum* clause, at the end of the treaty, after declaring that "the several delegates aforesaid," adds the words "and *the Cherokee Nation and people* have hereunto set their hands and seals."

4. The ninth article of the treaty is admitted by the defendant and was held by the court below to make the treaty to embrace, bind, and secure property to the claimant Indians then residing east of the Mississippi.

5. If claimant Indians were at the date of that treaty a part of the whole Cherokee people, then *by necessary*, legal, and constitutional intendment they were embraced within and bound by the treaty, although not present, nor specially nor separately represented in making it, as expressly held by this court.

Fellows *v.* Blacksmith, 19 How., 372.

6. Article X of this treaty, viewed along with Articles IV and IX, shows expressly that claimants were represented

in making the treaty, were a part of the tribe or Nation, and entitled, *as such*, equally with all others, to their proportion of all common or tribal property.

XXII. PLENARY POWER OF GOVERNMENT OVER TRIBES AND TRIBAL PROPERTY SHOWN BY LEGISLATIVE HISTORY.

The same proposition embodied in the foregoing paragraph XIII as to the plenary power of the Government to supervise and correct the legislation of tribes in regard to the administration of the common property of the tribe, and to exercise general control over such tribes and their tribal property, is shown by the policy and practice of the Government in its legislative and executive action regarding such tribes.

Examples of this legislation asserting this plenary power and establishing this policy may be stated as follows:

1. Section 2079 of the Revised Statutes, passed the 3d of March, 1871, (16 Stats., 566,) enacts that no "Indian nation or tribe shall be acknowledged or recognized as an independent nation or tribe or power with whom the nation may contract by treaty."

This statute has been in force, with additions and amendments, ever since it was passed It has fixed the status of the Indians authoratively as completely under the Government of the United States in all matters of public concern.

2. Section 2097 of the Revised Statutes, cited by the court below (R., 67,) apparently to show that the Government has no power over the affairs of Indian tribes—such as is exercised by the act which creates the jurisdiction of the court in this case, and such as was exercised by Congress in the act of the 18th of August, 1856, affirming the principles of Mr. Crittenden's opinion, and such as is exercised by the acts of Congress cited in the foregoing paragraphs recognizing the claimant Indians as a tribe or band,

sending them an agent, paying their delegates, taking a census of their numbers, providing for investigation of their claims against the Western Cherokees and the like—shows precisely the opposite of this. It shows this because it requires in effect the Executive to give the same force to an act of Congess as to a treaty in requiring the Executive to pay out Indian funds according to the provisions of each and either alike.

3. The acts of March 3, 1871, (16 Stats. 570,) of May 21, 1872, (17 Stats. 136,) of 29th of April, 1874, (18 Stats. 35,) of 3d of March, 1875, (18 Stats. 450,) now embodied in sections 2103, 2104, and 2105 of the Revised Statutes, are signal illustrations in enforcement of the power of Congress and of the Government over the Indians, as tribes and as individuals, and over their property. It in substance disqualifies every Indian and Indian tribe from making any contract for services relative to their lands, annuities, installments, moneys, claims or demands, unless such contracts are approved by named officers of the Government; and punishes the violation of this act of Congress as a crime.

Or take, at random, out of the multitude of statutes like it in principle, the act passed May 15, 1870, (16 Stats. 362,) directing the Secretary of the Interior to withhold from the annuities due the Kiowa Indians, twenty-five hundred dollars for each of two white children captured by said Indians, and to place the same to the credit of such children upon the books of the Treasurer, and directing the same to be invested and the interest to be devoted to such children's support until twenty-one and thereupon the principal to be paid them, the money to revert to the United States in case of their death without issue,—the same act making direction to withhold from any tribe within the territories of the United States making American captives, moneys due such Indians from the United

States. It is needless to say that such laws as these, disposing of Indian moneys and property, owing to the misconduct of the tribes or to feuds amongst them, or to controlling necessity for changing their status, abound throughout the statutes. It is likewise needless to add that such laws could not be passed in the absence of judicial trials in regard to the property of citizens generally, or in regard to any property, whether of whites or Indians, which was vested in private right, and to which the supervisory and administrative control of the Government does not attach.

We will not further encumber the brief with these citations.

XXIII. TITLE OF CLAIMANT IN COMMON PROPERTY NOT ONE MAKING REMOVAL WEST A CONDITION OF ENJOYMENT.

The considerations now gone over establish that the claimant Indians are a part of the "whole Cherokee people" and within the purview of those words in articles 1, 4, 9 and 10 of the treaty of 1846, and that this right in the common property, whatever that right may be, is secured to them at their *then* place of residence east of the Mississippi. If, therefore, they are not entitled to recover in this case, it must be because the right of recovery is defeated by one or the other of two defects in their title as acquired under such articles 1, 4, 9 and 10 arising out of some *other* terms of the treaty than those which make the grant explicitly to "the whole Cherokee people."

One of these supposed defects is that the other parts of the treaty attached to the grant, what is in the nature of a condition subsequent, to wit, that the grant is upon the condition that the estate will be forfeited by a failure to remove and join the tribe west of the Mississippi river. The other, that although the defect may not be technically in the nature of a condition subsequent working a forfeiture, yet that the grant of property is so made as to be a quali-

fied and limited one, under which limitation the property passed could only be enjoyed in a prescribed way and condition, namely, by its being enjoyed as the common inseparable and indivisible property of the Nation, held in common by one body politic called the Cherokee Nation, and that no enjoyment of it can be asserted otherwise than in this condition by those living with the Nation and bearing the burdens of the government.

The reply to each of these two alleged defects in our right to recover, is, we think, quite conclusive.

We reply first to the contention that the treaty makes the removal west a *condition* attaching to the grant, and that a failure to comply with the condition, to wit, removal to the west, works an absolute forfeiture of all interest in the grant.

It is self-evident that, if the removal west be in the nature of a technical condition, (as distinguished from a limitation or qualification of the estate passed by the grant,) then it is a condition "subsequent." It is impossible to show that the grants or reservations in the treaty of 1846, to the Eastern Cherokees, made the removal west a condition precedent to the vesting of the rights of these Eastern Cherokees named in article 10 of the treaty of 1846. If then the removal was made a *condition* at all, it was a condition subsequent. That the removal was not a condition either precedent or subsequent is made plain by the following considerations:

1. That the simple reading of the treaty shows the removal is not expressly made a condition.

2. Article 10 is inserted on purpose to exclude the idea that residence east worked any abridgment or forfeiture.

3. Conditions, either precedent or subsequent, working forfeitures are never allowed to arise by implication when no condition is attached to a grant; the grant being absolute in its terms, the courts cannot raise one by *implica-*

tion. They are strictly construed, are disfavored, and forfeitures under them never enforced in a court of equity. This is thoroughly settled law.

Story's Equity Jurisprudence, vol. 2, sec. 1319.
U. S. *v.* Segui, 10 Pet., 306.
U. S. *v.* Rodman, 15 Pet., 130.
Cullom *v.* Insurance Co., 1 Sumner, 434.
Merrifield *v.* Cobley, 4 Cush., 184, 185.
Windson *v.* McVeigh, 93 U. S., 274, 276.
Ward *v.* Screw Co., 1 Clifford, 565, 571, 577, 578.
Newton *v.* Commissioners, 100 U. S., 548.
Fellows *v.* Blacksmith, 19 How., 366, 371, *et seq.*
4 Kent's Comm., side p. 129, 130.
Tucker *v.* Ferguson, 22 Wall., 527.

4. If the removal is made a condition either precedent or subsequent by the treaty of 1846, then it is made such condition as to *all* the property granted by that treaty, including that covered by article 9. But it is confessed that the failure to remove did not forfeit the share of the proceeds of the sale of the common lands covered by article 9, and it has been paid to the claimant. Hence this is a concession that none of the property passed to claimants by that treaty has been forfeited under any condition of any sort.

5. But it was admitted in the argument below, and virtually held by the court below, that there has been *no* forfeiture, owing to any condition in the grant; and that the right of the Eastern Cherokees to enjoy the common property still remains unforfeited; and may be enjoyed by joining the Cherokee Nation west. Hence there is no forfeiture owing to any condition attached to the grant arising out of non-removal.

The other alleged defect in the title to recover is that the property acquired by claimants was a *qualified* one; that there is, in the treaty making the grant, a limitation quali-

fying the estate and making it incapable of enjoyment except under the one condition of removal west. That it is like the grant of a scholarship, of an endowment or of stock in a joint stock company, or the like, in this respect, to wit, that the property was so conveyed as that in order to its enjoyment the grantee must comply with the conditions prescribed or implied in the grant as to the *place* and *mode* and conditions of the enjoyment of the estate. This is really one and perhaps the main ground upon which the court below rested its decision.

The replies to this contention have been in part stated in former paragraphs, where we have shown that all tribal property held by Indians is held subject to the administrative control and visitorial power of the Government of the United States, and hence that all tribal matters, including the enjoyment of the tribal property, are subject to that visitorial and dominant supervision retained by the United States over all tribes and tribal property, and where we have shown that the political branch of the Government has legalized the division of the tribe and the *pro rata* devision of the common property.

6. But we now desire to add, to the considerations stated in preceding paragraphs, others leading to the same conclusion and establishing that neither the treaty of 1846 nor any other law, applicable to the case, subjects the claimant Indians, under the facts and law in this case, to an exclusion from the enjoyment of their property, in the conditions and at the place where they now are.

They are as follows:

1. On this point examine the recommendation of President Polk, contained in his special message, found in Senate Doc. No. 298, Twenty-ninth Cong., 1st Sess. In that message he deals with the divisions of the *same* tribe, and with the *same* treaties as are here involved prior and up to the treaty of 1835. The *grant* with which the President

deals in that message was the *very* grant relied on by the defendants in this case, and was a grant of property to the Cherokee Nation, in its national character as a tribe; and what that message recommends, and what the accompanying letter of the Commissioner of Indian Affairs recommends, is *precisely* what the court below (R., 67) held to be, in law, impossible in the present case, namely, a *division* of the tribe into two separate parts, and a *division* of the common property in proportion to their numbers. The President recommended that this division should be accomplished *by an act of Congress*, and not by a treaty. That it was competent to make such a division as the President here recommends was not then disputed, and cannot be successfully disputed now—especially in view of the Legislative and Executive action to which we have referred in former paragraphs. Such legislative policy extends through our entire legislative and Executive history, and is too firmly settled to be now a matter of legitimate debate.

2. The policy, as finally established by the legislation of 1871, now embodied in the Revised Statutes, section 2079, is the present and fixed policy of the Government; and under that policy the division recommended by President Polk, in the above-named special message, is impossible to be accomplished *otherwise* than by legislation, as distinguished from treaty action.

But the division, geographically, of the tribe into several parts, leaving the nation however one nation or tribe, in contemplation of law, the different parts entitled, under the visitorial and supervisory power of Congress, to enjoy, in their severed geographical positions, the common property of the Nation, is precisely what the claimant alleges has been brought about, (and this not by claimant leaving its old home,) and thoroughly legalized by the action of the Government, as shown in other paragraphs of this brief. The result of this is that to maintain, as the court below

held, (see R., p. 67,) that it is beyond the power of the Government to provide for the division of a tribe geographically, and for a division of the common property, is to hold that the policy embodied in section 2079 is *unlawful, and must be abandoned*, and return be had to treaties with the Indians. If it is not this, then it is to hold that the Government of the United States being incapacitated to *legislate*, must withdraw and abandon *all* supervision over Indian tribes and their tribal property. Neither of these alternatives, we submit, is now either tolerable or proper subjects of debate in this court.

If this be the predicament in which these tribes are left, and what was recommended by the special message by President Polk be beyond the political power of this Government, and if the policy established by section 2079 be also illegal or unconstitutional, then it follows that in case such bloody feuds, as are described in the President's message and the accompanying letter of the Commissioner, should again arise between parts of the Cherokee people, or of any other tribe, the tribes must be left by the Government untouched to consummate the work of murder and extermination, like that which was threatened to the Cherokees at the date of the President's message. We cannot conceive it possible for this court to fall into this view expressed by the court below, that the United States cannot "*interfere*" with such affairs of these tribes, (see R., p. 67,) nor see to the just and equitable administration of such tribes and their tribal property.

Having thus shown that it is within the *power* of *Congress*, as well as of a treaty, to provide for and legalize the division of a tribe geographically into separate parts and organizations, and to allow the separate parts to enjoy, *separately*, their respective rights in the national or tribal property, a question left is to inquire whether the acts of Congress, and the acts of the Executive thereunder, have, in the exercise of this legitimate power, accomplished this

division of the eastern and western Cherokees, and legalized it, and authorized the Eastern band to enjoy its share of the common property where it now is.

That the government has done so, to the extent of recognizing, as a band, the Eastern Cherokees, we have shown in the preceding paragraphs. It has done so in the legislation providing for taking charge of this band as of other tribes; in the legislation paying for their delegates, sending them an Indian agent, providing for their suing, as *such* band, in the United States Courts; in holding the title of the lands, where they now reside, in trust for them; in holding their common-school fund and paying it to them annually; in taking the census of the tribe; in investigating the differences between the eastern and western Cherokees; in deciding *in favor* of their right to the money sued for in this case, as set forth in Executive Document No. 79, (R., page 51,) and in many other like ways.

It is thus demonstrated that the government has *legalized this division* of the tribe geographically, and the only question left is whether such division, accomplished by Congress and the Executive, results, *either* in law or *equity*, in entitling them where they now are to a division of the common property, or proceeds thereof, in proportion to their number.

That *equity* requires such division is simply manifest. This organization of the Eastern Cherokees, being one sanctioned by Congress, cannot be treated as existing by tort, or as any sort of wrongdoing, and, besides being recognized by Congress, it is further expressly authorized by articles 9 and 10 of the treaty of 1846. The equity of the Eastern Cherokees to enjoy this property, in their separate residence and organization, is based upon the facts that—

(1.) They own it.

(2.) That they have the burdens of a government, so sanctioned by Congress and organized under constitution and laws, (see R., p. 42 *et seq.*,) of their own to support, including their common schools, public buildings, the care of

their poor, the improvement of their common lands by roads or otherwise, and every other expense incident to such a government.

(3.) The withdrawal of these Eastern Cherokees from the Western Cherokees is a withdrawal, proportionately, of the amount of expense which would be added to the western government by the presence of the Eastern Cherokees there, such as the school expenses, expenses incident to the general administration of the government, its poor laws, its criminal laws, and the like. It is thus made manifest that equity requires this proportionate division.

(4.) The act of Congress creating the present jurisdiction affirmatively and expressly requires that this court should adjudge this proportionate share to the Eastern Cherokees if that be required by equity. Its words are, "jurisdiction is hereby conferred upon the said court to hear and determine what, if any, interest, legal or *equitable*, the eastern band has in said moneys, stocks, bonds so held in trust."

If, therefore, a strict legal title is not found in favor of the Eastern Cherokees to have this division of funds, yet, their equitable right being plain, Congress has exercised its plenary power in this regard and commanded the court to adjudge to the claimants their proportionate interest in these funds, provided equity so requires.

XXIV. TREATIES UNAIDED BY STATUTES SECURE CLAIMANTS' COMMON INTEREST WHERE THEY NOW RESIDE.

We have, in the foregoing paragraphs, shown that, even conceding that the treaty of 1846, securing to the Eastern Cherokees in its 10th and other articles, where they then were, an equal proportionate interest in all the common property of the Nation, would not entitle them, by its own vigor, to receive their proportion of the proceeds of sales of land and of the annuities, yet the Government having

sanctioned, recognized and legalized their separate organization, location and status since the treaty of 1846, this results in giving them a legal and an equitable title to receive their said proportion of the common moneys at the place where they are thus, by said legalized organization and separation, authorized to remain and receive it.

But we by no means concede that the treaty of 1846, taken by itself, does not authorize them to remain where they are and demand their proportion of the annuities and of the proceeds of the sale of the common lands; on the contrary we have shown that article 9 and other parts of the treaty secure to them this division of the common property unaided by the sanction of the division of the tribe, which is found in subsequent action of Congress and the Executive.

XXV. TREATY OF 1866 PRESERVES CLAIMANTS' COMMON RIGHTS, AND DID IT NOT, THEN JURISDICTIONAL ACT WOULD WORK MODIFICATION OF IT.

It was contended below that the treaty of July 19, 1866, in its twenty-third article (14 Stats., 805), has fixed an obligation upon the United States whereby it is bound to invest all funds due the Nation, arising from the sale of lands, &c., in the way prescribed by that section, and in no other way; and that with this treaty provision the Government cannot interfere without breach of faith and usurpation of powers not possessed by it.

The replies to this contention are also quite obvious:

1. The first reply is found in Article XXXI of the same treaty (14 Stats., 806), the last clause of which contains the following provision: "And nothing herein shall be construed as an acknowledgment by the United States or as a relinquishment by the Cherokee Nation of any claims or demands under the guarantee of former treaties, except as herein expressly provided."

That is, that the Cherokee Nation relinquishes nothing, as in favor of the United States, that is not by this treaty "*expressly* provided." It therefore preserves, as against the United States, every possible right of the *entire* Cherokee Nation or people, unless such right is, in this treaty of 1866, "*expressly*" relinquished. It is impossible to assert that, if the Eastern Cherokees, as a part of the Cherokee Nation, had rights against the United States to have an equitable division of the national fund, then such right of the Eastern Cherokees is "*expressly*" relinquished. Therefore our right to an equitable participation in the common fund, as we have shown it to exist independently of the treaty of 1866, is, by that thirty-first article, expressly preserved to claimants, and the appropriation provided for by Article XXIII is an appropriation *cum onere*, that is subject to all equities and rights of the eastern band.

2. The second reply is, that, since it is competent for Congress, as we have shown in other paragraphs, by legislation to provide for the administration of tribal funds, and this without violation of treaty obligations, and since the act which creates the present jurisdiction requires the court to "determine what, if any, interest, legal or *equitable*, the said band has in the said moneys, stocks and bonds so held in trust," etc., and since such act further provides that what is adjudged to be so legally or *equitably* due to the claimants shall be, by the Secretary of the Treasury, paid over to them—therefore if it would be *inequitable* to administer Article 23 of the treaty of 1866, according to the construction of the defendant, which excludes the claimants from all the interest in the said fund, then such article 23 of the treaty of 1866 is, by this jurisdictional act, repealed. This power of Congress to repeal such treaties is familiar to the court and has been stated above. Per 112 U.S.R. 580-597

3. This 23d article of the treaty of 1866, even if susceptible of the construction put upon it by the defendants, namely, that it meant to cut off all rights of the Eastern

Cherokees in the funds covered by the article, is one in regard to a mere matter of "*administration*" of a public trust fund, held by the United States; and in regard to *such* matters of mere administration of such trusts and public funds we have shown, in other paragraphs, that as between the Government and Indians the visitorial and supervisory power of the Government is complete. But to these authorities we now wish to add, regarding *any* funds in which the United States has an interest, in seeing that they are equitably and properly administered and not squandered, that it is thoroughly settled by this court that such visitorial and administrative power exists as between the Government and its citizens. The principle in what is known as the Granger cases, (94 U. S. R. 113,) here applies, because upon this property there is impressed the quality of a "public use." But this point came more directly before the court in the case known as the Sinking Fund Case, (99 U. S., 700 and 726.) There the court held that because the United States had trust and other relations to the property of the Union Pacific Railroad Company and its management, and has an interest in the application of the earnings of the road to the payment of the company's debt to the United States, therefore the United States, under its power to amend the charter and to see to the applications of the earnings, could pass a valid law for the administration and appropriation of the company's earnings, that such a law did not impair property rights, the court saying that the said act was a valid one, because it was "a reasonable regulation of the administration of the affairs of the corporation."

Hence if it would be inequitable to deprive claimants under their present fully legalized organization of their share of the common property, then anything in the treaty of 1866, which attempts so to do, is *repealed* by that part of the act creating the present jurisdiction, which commands the court to adjudge to them every right, legal or *equitable*.

RECAPITULATION.

We now conclude these paragraphs by a recapitulation made as a matter of convenience to the court. The claimants are entitled to recover in this case, because it is shown by the record that—

1. The claimants are a civil person and a legal entity recognized and known to and organized under the laws of the United States.

2. By the 10th and other articles of the treaty of 1846 they are treated and made to be, although residing east, a part of the Cherokee Nation of Indians.

3. By this same treaty of 1846, the treaty of 1835 has fixed upon it the binding and treaty signification that it secured to the claimant Indians, along with the rest of the Cherokee Nation, a common interest in all the property of the Cherokee Nation, wherever situate and whatever its character.

4. The 10th Article of the treaty of 1846 expressly preserves to the claimant Indians, in their residence at the east, this common interest in all the common property of the Nation, as defined by said treaty of 1835, although still residing east.

5. Articles 1 and 4 of the treaty of 1846, in securing to the whole Cherokee people, including the claimant Indians, an equal interest in the lands of the Nation, further establish the equal interest of the claimant Indians in the common lands of the Nation and the common funds of the Nation.

6. The act of Congress providing for the payment of the proceeds of the sales of the common lands east, made by the treaty of 1835, upon the principles of the opinion of the Attorney General, fixes upon the claimant Indians the character of being a part of the Cherokee Nation, and entitled to their *pro rata* share under their present organization of the proceeds of the sale of the common lands.

7. The Executive branch of the Government has also, under the authority of these laws, recognized them as a part of the Cherokee Nation, and entitled to their *pro rata* share of the proceeds of the sales of the common lands sold under the treaty of 1835.

8. There is no legal or equitable principle which distinguishes between the right of the claimant Indians to receive what was by them received under Article 9 of the treaty of 1846, and their right to recover the moneys claimed in the present case.

9. This recognition by the political branch of the Government of their rights as a part of the Cherokee Nation in the common lands and money of the nation, is binding on the courts.

10. Congress has plenary power to regulate the administration of these public trust funds of Indian tribes, and power to recognize and legalize the division of the tribe in two parts, that residing east and that residing west, and power to provide for an equitable division of the national fund, whether lands, or the proceeds of the sale of lands, or annuities.

11. Congress has since 1846 expressly provided for the distribution of the proceeds of the sale of part of this land by affirming the principles of the opinion of the Attorney General, and by other similar acts of Congress, and has thus bound the Judiciary to recognize the status of claimant Indians, and their rights under that status to their proportionate share of the other common lands of the nation and common funds of the nation.

12. It being competent for Congress thus to provide for a geographical separation of the tribe into two parts and proportionate division of their property, and Congress having done so, it cannot be said that the claimant Indians are in equity not entitled to enjoy their proportion of the national property in and under their separate organization so legalized by the political branch of the Government, and

in order to do so that they must abandon the organization so legalized by Congress and the Executive.

13. The treaty of 1866 in its 31st article in effect carefully preserves these rights of the claimant Indians, because it preserves such rights unless expressly repealed by that treaty, which rights are not so expressly repealed.

14. The act creating the present jurisdiction is mandatory in requiring the court to render a decree in favor of the claimant Indians for whatever equitable as well as legal right they may have in the proceeds of the sale of land or other trust funds, and the equitable right of the claimant Indians to their proportionate share of both classes of funds is established by the considerations above recapitulated.

15. The "neutral lands," 800,000 acres, were bought and paid for out of the $5,000,000, in which confessedly the Eastern Indians had a proportionate interest, and having been so paid for, and having since been sold, the Eastern Indians are in equity entitled to their proportionate share of the purchase money.

And the same principle precisely applies to all other moneys covered by the petition, because such moneys arose from the sale of lands in which claimants had an equal interest proportioned to their numbers with the other Cherokees.

ARGUMENT.

We proceed now, more in detail and in the way of argument, to present some of the main points covered by the foregoing brief.

This suit is brought under a special act of Congress approved March 3d, 1883, (22 Stats., 585,) and, as expressed in that act, it is "to determine the rights of the Eastern Band of Cherokee Indians in and to the moneys, stocks and bonds, held by the United States in trust for the Cherokee Indians, arising out of the sales of lands lying west of the Mississippi River, and also in a certain other fund commonly called the permanent annuity fund."

The act confers jurisdiction upon the Court of Claims to hear and determine what, if any, interest, legal or equitable, the said Eastern Band has in said moneys, stocks, bonds so held in trust, and authorizes the court to enter a decree specifically defining the rights and interest of the Eastern Band therein, and in any moneys hereafter to be derived from sources similar to those out of which the existing fund arose.

The assignment of errors, which will be found at pages 4, 5, and 6 of the brief, indicate the grounds upon which the Court of Claims held that the appellants were not legally or equitably entitled to any portion of these funds. They may be summarized in one general proposition, to wit: That the appellant, the Eastern Band of Cherokee Indians, is not a part of the Cherokee Nation of Indians; that they had ceased to be Cherokees, and had become citizens of the State of North Carolina and citizens, or denizens, of the United States by reason of their failure to remove from the State of North Carolina, where they resided in the year 1835, and have resided continuously since,

and not removing to the country west of the Mississippi River, where the appellees now reside; and that having failed so to remove to the country west of the Mississippi they have forfeited all their rights and interests in the funds in question.

It will be necessary therefore in the presentation of this case to bring to the attention of the court the various treaties that have been made between the Cherokees and the United States from the year 1785 down to 1866, and likewise various statutes affecting the Cherokees that have been enacted since the year 1835, and this for the purpose of determining—first, what, if any, rights the appellant had in these funds by virtue of these treaties; second, whether they have ceased to be Cherokees, and become citizens of the United States and of the State of North Carolina; third, whether the Indians known as the Eastern Band of Cherokee Indians have lost any of those rights by non-removal; or fourth, whether, in order to the enjoyment of whatever rights they may have, they are compelled to reside with and belong to the Cherokee Nation west.

SYNOPSIS OF VARIOUS TREATIES.

We will therefore begin by stating briefly the provisions of the various treaties by which the permanent annuity fund of $214,000, a pro rata share of which the appellants are claiming, and also those provisions of said treaties by which the Indian title to the lands east of the Mississippi River was extinguished, and the title to the lands west of the Mississippi was acquired; stating at this point, in advance, the fact that under the treaty of 1866, certain of the lands, to wit, what are known as the neutral lands, (see Holden *v.* Joy, 17 Wall., 211,) that were acquired west of the Mississippi River were sold, and the proceeds of those sales are now held by the Government in trust.

The Treaty of 1785, (7 Stats., 18.)

Prior and up to 1785 the Cherokee Indians were occupying a vast tract of country, and by the treaty of 1785 certain boundaries were fixed, and the lands within those boundaries were allotted to these Indians as hunting grounds.

Succeeding Treaties prior to 1817.

Between 1785 and 1817 several treaties were entered into, by the provisions of which, portions of the lands lying within the boundaries fixed by the treaty of 1785 were ceded to the United States, in consideration of which cessions in said treaties, respectively, a certain amount as an annuity was granted to these Indians, so that prior to 1817, to wit, in 1809, the aggregate of these annuities had reached the sum of $10,000. These annuities were created while the entire Cherokee people were east of the Mississippi River and occupying the lands that were allotted to them by the treaty of 1785, and were the consideration paid by the United States for the common property of these Cherokee Indians. It can not, will not, be disputed that these annuities were derived through the cession of these lands east of the Mississippi River belonging to the entire Cherokee people.

The Beginning of the Removal West.

In 1809 a portion of the Nation desired to go west and a portion to remain where they were. Delegations representing each of these parties visited the President in 1809 and made known their respective wishes, the one to go to the west and pursue the hunter's life, and the others to remain where they were and engage in the pursuits of agriculture and civilized life.

The President granted permission to those who desired to go west to send an exploring party, and the result was that a portion of the Nation, prior to 1817, removed west and located on the public domain on the headwaters of the Arkansas and White rivers. The tribe having thus become geographically separated, a treaty was made in 1817, (7 Stats., 156,) between the United States and the chiefs and head-men of those remaining east and the chiefs and head-men of those who had removed west, for the purpose of making a distribution of these annuities and the apportionment of the lands between those east and those west.

By article 1 of this treaty the whole "Cherokee Nation" ceded to the United States certain land lying east of the Mississippi River described by metes and bounds.

By article 2 a further cession is made to the United States by the whole Cherokee Nation.

Article 3 provides for a census of those east and of those west and of those intending to remove west.

Article 4 provides for the division of the annuities, above referred to, ratably according to numbers as ascertained by this census, to be taken under the provisions of article 3, between those who were east and those who were west.

By article 5 it is provided that the United States "bind themselves in exchange for the lands ceded in the first and second articles, to give to *that part* of the Cherokee Nation on the Arkansas River as much land on said river and White River, acre for acre, as the United States received from the Cherokee Nation east of the Mississippi River;" and this article further provided that all treaties then in existence should "continue in full force with *both parts* of the Nation."

It will be noticed that in this treaty, although the tribe had become geographically separated, the United States dealt with this entire Cherokee people as constituting the Cherokee Nation, and the United States and the Cherokees recognized the fact that all the property, lands, and an-

nuities belonged to the entire Cherokee people, and that wherever they might be situated, east or west, they were ratably entitled to this property, and provision was made for the enjoyment of it by them ratably. This, so far as the annuities were concerned, was by dividing the annuities pro rata as ascertained by the census; and, so far as the lands were concerned, by setting apart to those west, acre for acre, a quantity of lands equal in quantity to their interest in the lands east; and thus it appears that the tribe, although geographically separated, was treated as a unit, and the property owned by the tribe was treated as the common property, in respect of which all were equally entitled.

TREATY OF 1819, (7 STAT., 197.)

By the treaty of 1819, article 6, the taking of the census, above mentioned, was dispensed with, and for the purposes of distributing the annuities it was assumed that one-third had removed west and two-thirds were yet remaining east of the Mississippi, and according to this, these annuities were distributed until 1835, and these *two parts* were recognized as constituting the whole Cherokee Nation under this treaty until 1835, although one of said parties then resided east, one west of the Mississippi. This treaty was made with the chiefs and head-men of the Cherokee Nation; and by article 1 there was a further cession of lands east of the Mississippi, and it was stipulated that "the lands hereby ceded by the Cherokee Nation are in full satisfaction of all claims which the United States have on them on account of the cession to a part of the Nation," &c. This was an adjustment of the treaty of 1817 in the way of giving to those west, acre for acre, a quantity equal to what had been ceded of the lands east.

TREATY OF 1828, (7 STATS., 311.)

This treaty was made with the chiefs and head-men of the Cherokees *west* of the Mississippi River, and by article

2 the United States agree to "possess the Cherokees and to guarantee it to them forever, * * * of 7,000,000 of acres of lands" therein described, and also "guarantees to them a perpetual outlet west as far as the sovereignty and right of soil of the United States extends." These 7,000,000 of acres are not the lands to which the Cherokees removed prior to 1817, lying on the headwaters of the Arkansas and White rivers, but are farther west, and in what is now known as the Indian Territory.

By article 7 the Cherokees surrendered to the United States the lands then occupied by them on the Arkansas and White rivers to which they had removed between 1809 and 1817.

This is the treaty by which the lands, the proceeds of the sale of which are in question, (excepting the 800,000 acres hereafter to be mentioned,) were acquired, and we will here repeat, as it is worthy of being borne in mind, that this treaty was made with the chiefs and head-men of the Cherokees west of the Mississippi, when the great majority of the tribe resided east, and yet at the same time stipulates that the United States agree to possess the "Cherokees" of these lands without regard to this geographical division.

Article 8 of this treaty offered inducements to those east to remove west, to wit, a rifle and blanket and kettle and five pounds of tobacco, and a just compensation for the property which each might abandon, and to pay the cost of emigration. And this we maintain distinctly recognizes the right of those who were still remaining east to continue to remain there, or to go to the west at their option.

The Treaty of 1833.

Of this treaty it is only necessary to say that it redefines the boundaries of the land mentioned in the teaty of 1828. Further than that it has no particular bearing on this case.

The Treaty of 1835.

The next treaty was made in 1835, (7 Stats., 478,) and is one made by the court below to be of very great importance in this case, and therefore merits special consideration in this discussion. At the time of making this treaty the Cherokees still had a quantity of land east of the Mississippi River larger than the three States of Massachusetts, Rhode Island and Connecticut, and it had been previously submitted to the Senate to fix the price that the United States should pay for them in contemplation of the cession of them to the United States. The price fixed by the Senate was $5,000,000.

This treaty was made by the chiefs and head-men of such Cherokees as were then residing east, those residing west having nothing whatever to do with the making of the treaty. And yet it deals with those who made it as the Cherokee Nation, and the property as being the property of the Nation. It contemplates the reuniting of their people in one body—throughout the preamble it refers to the Cherokee people and the Cherokee Nation, and in the article of cession, article 1, uses this language:

> "The Cherokee Nation hereby cede, relinquish, and convey to the United States all the lands owned, claimed or possessed by them east of the Mississippi River."

The consideration of this cession was the $5,000,000 that had been fixed by the Senate as being the proper price to be paid by the United States for them, with the further stipulation that if the Senate had not embraced in that sum any allowance for spoliations, an additional sum of $300,000 should be allowed on that account.

We are speaking now of the treaty of 1835 as originally drafted. There was a supplement to that treaty which will be presently considered,—the treaty and the supplement having been ratified in 1836, and constituting together one

treaty. But going back to the treaty of 1835 as originally drafted, it will be seen, that by the last clause of article 2 the United States agreed to convey to the "said Indians," "the Cherokees," 800,000 acres of land for the consideration of $500,000. This land is described in this article 2, and is in addition to the 7,000,000 of acres and the outlet west, and this $500,000, the consideration for this cession by the United States to the Cherokees, was paid out of the moneys derived from the sale of the lands east, to wit, out of the $5,000,000, which had been fixed by the Senate as the price for all the lands that were remaining east of the Mississippi River.

By article 11 of this treaty, it is provided that (although it was in fact made only with a fraction of those Cherokees who were east of the Mississippi River,) the annuities above mentioned, which up to that time had been divided between those east and those west ratably, were commuted into the sum of $214,000, and thus although in form only treating with those east, the Government dealt with them as representing the entire Cherokee people, those east and those west; because the annuities, which by the stipulations of previous treaties were being divided between those east and those west ratably, were disposed of by commuting said annuities into a fixed sum, namely $214,000, and thus showing that the United States, although dealing nominally only with those east, regarded the treaty as being one relating to and binding upon the entire Cherokee people.

Articles 8 and 9 provided for payment for improvements, ferries, claims for spoliation, and the like.

Article 10 provided for making certain investments, and then article 15 provides that the balance of the $5,000,000, after paying for the matters referred to in articles 8 and 9, and the investments in article 10, should be divided between those *east* in June, 1833, per capita.

Here we wish it observed particularly that the balance

of the $5,000,000 was to be divided per capita amongst those who were yet remaining *east in* 1833, (between 1833 and 1835 some of these Indians had removed to the west.) The amounts to be paid for spoliations, &c., under artilces 8 and 9 were to be paid to the individuals east who had lost their property, and thus out of the $5,000,000 there was to be paid to those *east* the value of the improvements, &c., that they, individually, had lost, and the remainder of the $5,000,000 was to be equally divided amongst those who yet remained east, thus showing that under this treaty the entire purchase-money was to be paid to those east. This is important to be kept in mind, in view of the provisions of the treaty of 1846, hereafter to be considered.

By article 3 of this treaty of 1835, it is provided that the United States agree that the lands ceded by the treaty of 1833 included in the redefined boundaries and the outlet, and the lands ceded by this treaty of 1835, to wit, the 800,000 acres, should be embraced in one patent "to the Cherokee Nation of Indians," and thus was embraced in this patent the 800,000 acres that were undeniably purchased with *moneys* which in part at least belonged to the eastern Cherokees.

Article 12 of this treaty authorizes such Cherokees as did not desire to remove to the west to remain east, and gave to them certain lands; or, in other words, authorized them to elect to remain if they saw fit to do so, and in the event of such election provided for setting apart to them certain quantities of land.

Such was the treaty of 1835 as originally drafted. But the United States having determined upon the policy of compelling the removal of these Indians to the west and thereby freeing the States east of their presence, the supplement of 1836, (7 Stats., 488,) which really was a part of the treaty of 1835, was made, and by that supplement the provision for making reservations in favor of those who should desire to remain was abrogated, so that the en-

tire body of lands passed to the United States without any reservation whatever in favor of those east.

Under the provisions of this treaty a large majority of these Indians who were then east removed, under compulsion of military authority, between 1836 and 1846, to the west and joined those west.

At this point, as it comes in chronological order, and as we insist has an important bearing upon this case, the attention of the court is called to some facts which appear in the history of these transactions as found in the archives of the Government, and also as found in the findings of the Court of Claims in this case.

In this connection we desire to bring to the attention of the court the discussion by the Court of Claims, and the use made by that court, in disposing of this case, of what in the brief is known as the Thomas agreement, so far as it has application to the treaty of 1835, and also to the treaty of 1846. The portion of the opinion here referred to commenting upon the bearing of the Thomas contract upon the treaty of 1835 will be found beginning at the bottom of page 59 and continuing on page 60 of the record; and that portion which refers to the bearing of this Thomas contract, and the memorial containing it, on the treaty of 1846, begins at the bottom of page 62 and ends at the bottom of page 63.

In order to fully understand our position in respect of this agreement, as applicable to the treaty of 1835 and to the treaty of 1846, it is necessary to state, as will appear upon a reading of this document, that while the treaty of 1835 and its supplement of 1836 was under consideration, Thomas came to Washington as the representative of a portion of these Indians and with a power of attorney to act for them.

A question arose as to the true meaning of that treaty, and as to whether or not it preserved to those Indians who should not remove west certain rights which they were as-

serting. The opinion of the North Carolina Senators was taken in that regard, but, by way of making assurance doubly sure, this agreement was entered into, in which it was expressly stipulated that these North Carolina Cherokees are entitled to an equal share, proportioned to their numbers, in all the lands belonging to the Cherokee Nation of Indians; and that notwithstanding they had been deprived of their share of the annuities since the year 1820, they are, nevertheless, entitled to all sums in possession of the President of the United States for the use of, and annuities due from the United States to the Cherokee Nation of Indians, except such as belong exclusively to the Cherokees now living west of the Mississippi, their proportionate share of which benefits was *intended* to be secured to them by the 12th article of the treaty of New Echota, which reads as follows, then quoting the 12th article.

By the last clause of article 2 of this agreement it is stipulated that "the President of the United States is requested to pay them their *proportionate share of all sums arising from the sale or transfer of all the common property as mentioned in the first article in this agreement*," *that is, in all the lands belonging to the Cherokee Nation of Indians.*

Then article 3 of this agreement provides that if any construction be given to the treaty, whereby these North Carolina Cherokees should be deprived of an equal share, proportioned to their numbers, "in all sums arising from the sale or transfer of the common property mentioned in the first article of this agreement, * * * we will request the President and Senate of the United States, and they are hereby requested, to allow them such supplemental articles thereto as shall remove such improper constructions and enable them to receive their equal proportioned share as above mentioned."

And article 4 provides, "should a *division of the lands west of the Mississippi belonging to the Cherokee Nation as a com-*

mon property take place, the above mentioned Cherokees shall be entitled to have their share laid off for them."

This agreement, although not signed before the ratification of the treaty, had been reduced to writing prior to that time and submitted to the Senators from North Carolina. (See Ex. Doc. 408, near bottom of page 4, 1st Sess., 29th Cong.)

This agreement was signed three days after the ratification of the treaty. Immediately after this agreement was entered into it was placed on file in the Interior Department, and has ever since remained part of the executive files.

We have never claimed, and do not now claim, that this agreement can, as an actual part of the treaty, *control* any *unambiguous* language of the treaty of 1835; but we do contend that, so far as the treaties of 1835 and 1846 are concerned, it can be used in the *interpretation* of any ambiguous language of these treaties, bearing upon claimants' rights. We insist that it has an important bearing upon the construction of these treaties, and especially of the treaty of 1846, because it is a part of the history of these treaties of 1835 and 1846, and connected itself as part of the *res gestæ* directly with the making of each treaty. This contract was not only of record in the Interior Department, and therefore presumably within the knowledge of the Senate, but it was expressly brought to the attention of the Senate while the treaty of 1835, and also of 1846, was under consideration in the Senate, as will more fully presently appear. But the Court of Claims, when it comes to deal with this agreement in connection with the treaty of 1846, seems to have lost sight of what it said with reference to this agreement not being allowed to aid in interpreting the treaty of 1835, wherein they said it could not be used for the purpose of interpreting that treaty, and the court proceeds to give great consequence to a mere brief by Thomas, made in 1846. This brief is a document of far less significance than

an agreement formally entered into by a large portion of the very men who made the treaty of 1835, in which they declare its meaning; and, as we shall see, the court inadvertently misread these communications of Thomas which it so uses against claimants.

When the treaty of 1846 was before the Senate, Mr. Thomas presented a memorial on behalf of these North Carolina Cherokees, which is found in Ex. Doc. No. 408. The Court of Claims says that by this document Thomas set up all the claims made by the Cherokees east, and that his statement then made is inconsistent with the claim that is now made, and uses that statement for the purpose of interpreting the treaty of 1846. So that the court in the one case is asserting that the Thomas agreement is utterly valueless, and cannot be considered in the interpretation of the treaty of 1835, and yet gives very great consequence to what Mr. Thomas said in his memorial and argument, or statement of claims, in connection with the interpretation of the treaty of 1846.

Another document referred to by the Court of Claims in this connection is Ex. Doc. No. 298, (1 Sess., 29 Cong.,) in which argument or brief, as we will have occasion presently to show, Thomas was dealing exclusively with the question of the payment of the personal benefit, &c., moneys that the United States held belonging to these Indians; and which brief had no relation whatever to the claims involved in this suit. The court below makes that brief of Thomas also to be useful against claimants in the interpretation of this treaty of 1846, and lays especial stress upon that brief as well as the other, to wit, the memorial embodied in Document No. 408, to which we have referred, as will be seen at page 63 of the record. And the court adds: "Thus were presented to the treaty-making power, when negotiations for the treaty of 1846 were going on at Washington, the exact claims and all the claims made by the Cherokees east." (See page 63 of the Record.) This statement of the court, that the claims

presented by Thomas in Document 408 and Document 298 did not embrace the present claim, is a palpable error of fact, of course unintentional.

By turning now to the Document 408 it will be seen (bottom of page 1) that he, Thomas, states: "Your petitioners have annexed to this memorial *the short statement of their claim* and proof in support of it which was exhibited to the Commissioner of Indian Affairs," &c.

Now, turning to this statement of their claim, which immediately follows, it will be seen that he was insisting that certain money payments should be paid to them, which had been withheld and to which they were entitled under this treaty. Then, at page 4 of this document, he recites the facts substantially as we have before stated them as to this agreement having been entered into prior to the ratification of the treaty; of its submission to the Senators; states that it was accepted in lieu of a supplement to the treaty; and then proceeds to state the substance of that agreement, as will be seen at page 5, to wit, that it is admitted that these Cherokees are entitled to an equal share proportioned to their numbers in all the lands; that they are entitled to their share of the annuities since 1820; that they are entitled to an equal share in all the sums arising from the sale or transfer of the common property; that they would request the President and Senate to allow them such supplemental articles as would remove improper constructions and enable them to receive their equal proportioned share as above mentioned, and that in case there should be a division of the lands west of the Mississippi, their share should be laid off for them.

Thus it appears, distinctly and unequivocally, that when Thomas presented this memorial to the Senate of the United States, in which he set up the claim of these Indians, he set up the very claim that is mentioned in this Thomas agreement, and the very matters covered by the present action, and this memorial the Court of Claims treats as

being of exceeding importance in construing the treaty of 1846; and, inasmuch as it finds the memorial to be inconsistent with the present claim, concludes that the treaty of 1846 does not sustain the contention of the appellants. It is probably fair to infer that if the Court of Claims had not misread this memorial, and had not failed to observe that it did cover, present to the Senate, demand, urge, and insist upon these very claims sued for, then the court would have reached exactly the opposite conclusion from that at which they arrived.

The court say that "these documents afford much light upon the true meaning and construction of the treaty," (bottom of page 62,) and they say (middle of page 63,) that he also makes no claim whatever "either to any part of the permanent fund of $214,000 under the eleventh article of the treaty, or to any share of the common lands west." Then they add, "from this it is clear that they did not consider that the treaty gave them any interest in the western lands, except such as might be assigned to them as they chose to go there." The truth in regard to the claim made by these Indians in their memorial to the Senate, and which was pressed upon the Senate at the very time of the making of the treaty of 1846, is precisely the opposite of what the court below states as the fact. Thomas, in the memorial of these Indians, presents and presses upon the Senate the allowance of each and every claim and demand urged by the present action. (See pp. 4 and 5, Senate Doc., 408.) The misreading of this document by the Court of Claims is too conspicuous to need further mention.

What we claim is that, to use the language of the Court of Claims itself, these documents "afford much light upon the true meaning and construction of the treaty" of 1846. They do throw much light upon it. They show that these Indians were claiming then as they claim now that they were entitled to their share of the proceeds of the sales of these lands and the annuities. And in support of this

We ask attention now more particularly to the two documents to which reference has already been made, namely, Documents 408 and 298.

The particular part of this Document 298 to which attention is invited will be found beginning at page 171, (an argument by Thomas.) A large portion of that argument is devoted to a discussion of the character of the title of these Indians to the lands east of the Mississippi River, and to the manner in which the treaty of 1835 was procured. He argues, and argues with great force, that the States had passed laws by which they had "annihilated" the Cherokee government; had forbidden them from assembling in council to enact laws, or to attempt to enforce those that had been previously enacted, making it a penal offense, punishable with fine in the penitentiary, to attempt to enforce such laws; that the United States had made that treaty with individuals who had no authority from this Nation to represent anybody but themselves, and so on. And then proceeds to take up the matter of the claim of these Cherokees, on account of the moneys that the United States held under the provisions of that treaty, and he proceeds to show, (at pages 177, 179, 180, and especially at 182 and 183,) that the United States had withheld from these North Carolina Cherokees moneys that were due to them, and he was insisting that those moneys should be paid.

The question as to their rights in the lands, or in the proceeds of the future sales of the lands, was not a question in controversy, or in any sense being considered. He was simply showing that the United States owed certain moneys to these Cherokees that had not been paid, and in point of fact this contention was subsequently sustained by the opinion of the Attorney General, and the subsequent act of the executive in respect thereto. It is impossible to make anything else out of this brief, upon which so much

stress is laid by the Court of Claims, than just what we have said of it here.

That argument of Mr. Thomas, in which he makes this statement in respect of these moneys, was submitted to the Commissioner of Indian Affairs for the purpose of procuring the payment of the moneys therein referred to, and on the 13th day of April, 1846, the President transmitted that document, along with others, to the Senate; so that this claim was thus brought to the attention of the Senate by this particular document.

Then on the 25th day of June, 1846, a little more than a month before the treaty of 1846 was agreed upon, Thomas submitted "the memorial of the *Cherokee Indians residing in North Carolina* to the Senate of the United States." This constitutes Document 408 above alluded to, and, as we have already stated, in that document they presented this very Thomas agreement, and brought to the attention of the Senate the fact that they were claiming their share of the proceeds of any sales of the common lands, and all other common property,—a claim that they had preferred in 1835–'6, before the treaty was ratified, and which they had persisted in continuously thereafter.

Now at this point we wish the court to bear in mind that these documents show, and it is an undisputed fact, that all the time from the treaty of 1836 on down to the treaty of 1846, and even after the treaty of 1846, it was contended by these western Cherokees that the eastern Cherokees were not entitled to this commutation fund of $53.33, nor to any of the personal benefits, and per capita, that is to say, their share of the $5,000,000 purchase money. This claim to have these benefits they had insisted upon, but the Government had not recognized their right to them. They were insisting upon being paid, and Thomas, in his said brief in Executive Document No. 298, to which reference has been made, was showing in the main the reasons why they were entitled to them and why they

should not longer be withheld. That was the *main* subject of discussion by him, and indeed it was the only matter which called for any discussion before the Executive. The funds now involved in this suit as a matter pending before the Executive had no existence, and never, as a matter of administration, came into existence until after the treaty of 1866, with the exception of the annuity fund. And it will further be observed that one of these documents, namely, his argument in Document No. 298, (pp. 171, 184, inclusive,) to which reference has been made, was addressed to the Commissioner of Indian Affairs, an executive officer who had no power to deal with anything excepting the matter of the funds that might be for distribution, and the proper distribution of those funds was the sole purpose and object of that communication.

There would have been no propriety in presenting to this officer any claim for division of lands, or for division of the proceeds of the sales of lands, which sales had not occurred, and for which no provision had as yet been made; and therefore to attribute to an omission to present any such claim, in such a document to such an officer, the force which has been attributed to it by the Court of Claims, seems to us without any pertinency whatever.

Document 408 (the memorial) is addressed to the Senate, and in that he not only discusses the money demands, to which we have alluded in the brief, in Document 298, but he is careful, having now come to the legislative branch of the Government, to bring to its attention not merely these money demands, but their claims as to the proceeds of the sales of the land also.

We submit, therefore, that these documents do indeed "afford much light upon the true meaning and construction of the treaty" of 1846, the particular provisions of which we next consider. The criticism by the court below that the fifteen Cherokee delegates whose names are signed to the Thomas agreement, (Senate Doc. 408, p. 5,) had no

power to make that agreement, is here without force, because this Thomas agreement is here relied on, not as being part of the treaty, but as a document agreed upon at the date of the treaty of 1835 by most of those who made that treaty, as showing its true meaning, and as a document again presented and urged upon the Senate when it made the treaty of 1846, thus showing what claims, at the date of the last-named treaty, were then urged by these eastern Cherokees. For the purpose of interpreting any doubtful language in the treaty of 1846 this document becomes exceedingly important. (See cases cited in Brief at page 27.)

From the foregoing it will be seen that the construction of this treaty of 1846, which we maintain and upon which the present suit is brought, is not an afterthought, but is the very interpretation that was insisted upon from the date of the treaty of 1835 onward.

Treaty of 1846, (9 Stats., 871.)

This treaty, we claim, is controlling in this case, and especially so when taken in connection with the acts of Congress which followed it, and which will hereafter be mentioned. By reference to that treaty it will be seen that certain claims had been paid out of the $5,000,000 to which the Indians did not assent, and by article 3 the United States agreed to reimburse that fund, and to distribute it among the Cherokee people according to article 9.

By turning to article 9 it will be seen that the amount of the fund when reimbursed was $6,647,000. Out of this $6,647,000 certain deductions were made, therein specified, and then it provides that the remainder, after these deductions, should be divided among the Cherokees east per capita.

It will be remembered that by the treaty of 1828, which was made with the Cherokees west of the Mississippi, the

United States agreed to possess the Cherokees of 7,000,000 of acres and the outlet west, and that this 7,000,000 of acres was an exchange, acre for acre, for lands east. That is to say, the United States ceded as many acres west as the Cherokees west had been entitled to *pro rata* in the lands east.

And it will further be remembered that the $5,000,000 to be paid under the treaty of 1835 were to be distributed amongst those east. This treaty of 1846 took up this complicated and uncertain condition of the affairs of this Nation, into which they had been brought by these treaties prior to 1846, and proceeded, as is apparent upon its face, and as will be more particularly noticed, to adjust them amongst these Indians; and, as we have seen by articles 3 and 9, proceeded to dispose of the moneys of the Cherokees, to wit, the $5,000,000, among those east per capita.

Then in article 4 it takes up the subject of the lands and the interest of the western Cherokees in the moneys of the Nation, and it declares that the western Cherokees had no exclusive title to the lands ceded by the treaty of 1828, that is, the lands west of the Mississippi River; but that the same were intended for the use of and to be a home for the whole Cherokee Nation, and those east as well as those west.

Then it further stipulates that those west, by *equitable operation*, had a common interest in the lands east which had been ceded by the treaty of 1835, which had not been provided for, and from which the $5,000,000 was derived, and that because they had an equitable interest in those lands east, they had an equitable claim on the United States for the value of that interest; and it then provides the method of ascertaining the amount of that interest, for allowing it, and further provides for dividing that equitable interest among those west; and thus by the provisions of articles 3, 4 and 9 those east and those west had distributed among them per capita the *money* received on account of these

cessions of lands east. And thus, although those west were occupying all the lands that had been derived from the United States in exchange for lands east, provision was made to give them their share of all the *money* received for these lands east.

This left for consideration the disposition of the *lands* received in addition to the money. The money and the lands west, together, constituted the consideration paid by the United States for the lands east, and this treaty having provided, as already shown, for an equitable division of the money part of this consideration, then proceeds to deal with the other part of it, namely, the lands, and this is done by the last paragraph of this article 4. This paragraph provides that the western Cherokees relinquish all their interest in the lands *east*, and relinquish their claim to *exclusive ownership of the lands west*, to wit, the original cession, the outlet, and the 800,000 acres, and stipulate that the "*same shall remain the common property of the whole Cherokee people, themselves included.*"

Now, at this point we wish it particularly noticed that here it is undeniable that these North Carolina Cherokees were embraced in this stipulation of the treaty, whereby these lands are made the common property of the whole Cherokee people. Then it is provided by article 10 that nothing in that treaty shall be construed to abridge any rights or claims that those then residing east had or may have under the treaty of 1835 and the supplement thereto. This article, it will be observed, recognizes distinctly rights as existing in those Indians who had not since the treaty of 1835 removed west, but still remained east, and carefully provides for protecting and preserving all the interest that they had or might have under the treaty of 1835 and the supplement.

It has been contended and doubtless will be again contended that under the treaty of 1835 these North Carolina Indians were required to remove to the west; that it was

the policy of the Government to compel their removal, and that the result of a failure to remove is the destruction of their rights in this property. And in view of this contention we desire it to be especially noticed that this article 10 clearly contemplates their remaining where they were, and that they should not lose any rights thereby.

It will be remembered that the result of the treaties up to and including that of 1835 was, that all the lands east had been ceded by the Cherokees to the United States, in consideration for which the United States had ceded the 7,000,000 of acres, the outlet, and the 800,000 to the Cherokees, and had agreed to pay in the aggregate the sum of $6,647,000; that this money, less certain expenditures, was to be divided among the Cherokees east per capita. But in 1846 the whole subject was taken up for adjustment, and it was agreed that the lands for which this money had been agreed to be paid did not belong exclusively to those east, but that those west had an interest in those lands, were entitled in equity to be paid for that interest, and provision was made for paying them therefor, and it was likewise agreed that those west did not have the exclusive right to the lands west, but that they were the common property of all. This made all equal, both in money and lands.

These claimant Indians are the same or descendants of those who never removed west, and the question now is whether by their failure to remove west they have lost their rights in this property, or whether they are entitled in equity to their share of the proceeds of so much as has been sold, and to their share of these $214,000, the sum into which the annuities were commuted, both the lands and these moneys being the product of the common property which this entire Nation enjoyed which lay east of the Mississippi River.

It will be seen by referring to the opinion of the Court Claims that that court concluded that they had no legal or

equitable right, for the alleged reason that they had ceased to be a part of the Cherokee Nation, had expatriated themselves by remaining where they had no right to remain, and that they could only enjoy this property by reuniting themselves with those west, and participating in its enjoyment in common with those west. We submit that this proposition is wholly untenable, and will attempt to sustain this contention not only by the treaties, but by both executive and legislative action in connection with this business and this people. We insist that by the treaty of 1846 and by subsequent executive and legislative action of the Government, these North Carolina Indians were authorized to remain where they now are, and that by so remaining they did not become citizens of the United States, or of the State of North Carolina, and that their rights to this share of this property have been preserved to them by the treaty of 1846, and by this subsequent executive and legislative action, to which reference will presently be made.

CITIZENSHIP.

The next question we consider is whether the treaty of 1846 does as a matter of fact regard, recognize, and treat the Cherokees who, at the date of that treaty, were still east of the Mississippi, as being still part of the whole Cherokee people or Nation, and also as not citizens of the United States?

The answer to this is obtained by simply reading that treaty. It recognizes and makes such Cherokees then east of the Mississippi to be a part of the Cherokee Nation in the ways following, to wit:

1. The preamble to this treaty expressly declares (1) that the Cherokee Nation has been divided into different portions, having difficulties with each other; (2) that these "different portions" constituted and were recognized as the Cherokee Nation of Indians; (3) that this treaty was

made to restore harmony among these; (4) that two classes of claims against the United States existed, which the treaty proposed to settle, one in favor of the Nation and the other in favor of "portions" of the Cherokee people.

Thus, the preamble makes it express that every part or "portion" of the tribe with which the treaty dealt is dealt with as "constituting and is recognized as the Cherokee Nation of Indians." If, therefore, other parts of the treaty show that the Cherokee Indians who, at the date of this treaty in 1846, resided east of the Mississippi, were one of these "portions" into which the tribe was divided, and was one of the portions which held claims against the United States, then the preamble expressly makes such eastern Cherokees to be a part of the Nation.

That other parts of the treaty do so make these eastern Cherokees to be one of such portions of the Nation, as, for example, articles 9 and 10, we shall see as we go on.

2. This division of the Nation into "portions" or "parties," so referred to in the preamble, is again alluded to in article 2, (pp. 871–872,) and the division of the Nation into parties is expressly there preserved only so far as "is necessary to carry out the convention or treaty"—that is, necessary in order in the future to settle with and secure to each "portion" of the Nation the separate rights secured by the treaty.

3. Article 3 of this treaty, in providing for restoring to the *per capita* fund covered by article 9, the deduction therefrom improperly made by the treaty of 1835, (to wit, the deducting of (1) rents under name of improvements, and spoliations covered by article 16 of the treaty of 1835; (2) "reservations" allowed under article 13 of the treaty of 1835; (3) the expenses of the treaty of New Echota; (4) sums paid to any agent of the United States,) expressly covenants that this fund of $5,000,000, so to be increased

by these "restorations," shall form an aggregate amount to be distributed to *the Cherokee people*, as provided in the ninth article of this treaty. Now, turning to this ninth article, it is seen that it expressly makes all who resided east at the date of the treaty of 1835, and its supplement, to be that Cherokee people named in this article 3; and it is admitted that claimant Indians came within that class. Thus, article 3 in express terms makes claimants part of "the Cherokee people."

4. The fourth article of the treaty expressly makes all the Cherokees who in 1825–1835, and afterwards, resided east, to be a part of one Cherokee Nation, all retaining, "*as a constituent portion of the Nation*," a common interest in the common property. It is undeniable that claimants were a part of those so residing east.

5. After article 4 had fixed by its covenants the binding sense of the treaties of 1828 and 1835 as being a sense which made all Cherokees east and west "constituent parts of the one Nation," and after providing for paying to the western part or old settlers the value of their interest in the lands which had not been provided for *per capita*, then the treaty, in article 9, takes up the matter of ascertaining and dividing this $5,000,000 fund to the eastern "portion" of the Nation. In defining who should be deemed the eastern portion this article 9 is solicitously careful and exact, in order to exclude all possible doubt as to who should be deemed part of this two-thirds or eastern "portion" of the Nation. It does not make this portion to be those emigrating under the treaty of 1835, or those composing the treaty party and the Ross party and the Adair party. Nor does it make this two-thirds to be made up of those named in the title to the treaty, deducting the old settlers. All these modes of designation are carefully dropped, and instead is used a designation impossible of being mistaken,

to wit, "*being all those Cherokees residing east at date of treaty of* 1835 *and the supplement thereto.*" These *and their* legal representatives are taken in and expressly and literally made, by the treaty of 1846, article 9, to be then a part of that Cherokee people named in the part of article 3 which refers to article 9.

If, now, for the purposes of the present claim, the claimants' attorneys sought to frame provisions which would take in, as part of the "Cherokee people," the present claimants, it would be impossible to devise words which would do so more conclusively than do these words of article 9, which take in and make to be, for the purposes of the treaty, *not only* every Cherokee who resided east at date of treaty of 1835, but the *representative* of every Cherokee then so residing.

6. Then the very next breath of the treaty, to wit, its tenth article, by way of making mistake impossible as to whether those residing east at its date in 1846 were parties to the treaty and deemed by it a part of the Cherokee Nation, carefully provides that the rights of "the Cherokees *now residing* in States east of the Mississippi" shall by that treaty not be abridged.

The very juxtaposition of this tenth article with that ninth article augments the conclusive force of the two in fixing the fact that the treaty itself, *by its own vigor*, makes these claimants part of the Cherokee Nation. The ninth had said that all and the representatives of all residing east in 1835–6 should share as part of the two-thirds and as Cherokees in the division. But, as it stopped there, and had said nothing about the *consequences* of a failure from 1835 to 1846 to remove west, and had not said whether that failure to remove deprived them of membership in the Nation or of property rights, therefore, to put this at rest, the tenth article is added immediately after the ninth, and excludes all possibility of doubt as to the effect

of the failure to remove. It declares them still to be Cherokees, and as retaining all treaty rights as provided in treaty of 1835 and its supplement.

What we have now said demonstrates that the treaty of 1846 does indeed treat, regard, and make the claimant Indians a part of the whole Cherokee people.

And we now consider what further it does as to claimants' rights.

The treaty of 1846 was interpretative, in a large measure, of that of 1835–36.

It took up the entire subject-matter of the relations of these Indians, both east and west, to each other, and to these lands and moneys.

It declared that the lands still held in 1835 east, ceded by that treaty, were the common property of all, and so likewise were the lands west. And, as shown by the analysis just made, it expressly recognized the right of these claimants to remain, and not to lose any rights by not removing.

This very interpretation for which we contend was the subject of Executive consideration and action.

It came before the Attorney General in 1851 in connection with certain appropriations made in pursuance of these treaties of 1835–6 and 1846. (5 Op., 320.)

Three appropriations were made by Congress in respect of which the opinion of the Attorney General was invited, and this made it necessary for the Attorney General to review these treaties of 1835–6 and 1846. We give here a statement of the purposes for which these appropriations were made, and the conclusions that were reached by the Attorney General in respect of them.

The act of September 30, 1850, (9 Stats., 556,) appropriates $189,422.76, with interest at five per cent. on the same, according to the resolution of the Senate of the 5th of September, 1850, this appropriation being for the additional amount of expenses paid for subsistence improperly

charged to the treaty fund of $5,000,000, according to the award of the Senate of the 5th of September, 1850, under the provisions of the eleventh article of the treaty of the 6th of August, 1846, this declared to be in full of amount improperly charged to said treaty fund and to be paid only to the Indians to whom it is due per capita.

The sum of $532,896.90 was appropriated by the same act, (9 Stats., 556,) to pay the old settlers in full of all demand under the treaty of the 6th of August, 1846, according to principles established in the *fourth* article thereof, and provides for the payment of the old settlers in pursuance of the award of the Senate of the 5th of September, 1850, under the reference to the Senate contained in the eleventh article of the treaty of 1846, and provides that the money shall only be paid to the Indian or Indians to whom it is due, and that such Indians, old settlers, must receipt in full for demands under the fourth article of the treaty of 1846.

The $724,603.37 (commented on in said opinion) is contained in the appropriation act of 27th of February, 1851, (9 Stats., 572,) and is for the payment to the Cherokee Nation of that sum and interest at 5 per cent. from the 12th of June, 1838, until paid, no interest to be paid after the 1st of April, 1851; and the section provides that this amount shall be in full satisfaction of all claims whatsoever of the Cherokee Nation under any treaty heretofore made, and requires that the Nation shall give the United States a full and final discharge of all demands whatever on the United States, except such annuities in money or specific articles as the United States may be bound by any treaty to pay to the Cherokees, and except also such moneys and lands, if any, as the United States hold in trust, and requires the appropriation to be paid in strict conformity with the treaty of 1846. These appropriations are in satisfaction of the requirements of the treaties of 1835–6 and 1846.

The Attorney General's opinion, amongst other things, finds the following on page 324 as the results of the three treaties, to wit, that of 1835, 1836, and 1846, construed together; that those who were entitled by the fifteenth article of the treaty of 1835 to participate in the distribution of the balance of the purchase-money provided by that article are the following three classes of Cherokees:

1. Those Cherokees who had removed west of the Mississippi prior to the treaty of 1835.

2. Those who at the date of the treaty of 1835 were residing east of the Mississippi, but who had gone west before the treaty of 1846.

3. Those Cherokees who at the date of the treaty of the 6th of August, 1846, were still residing east of the Mississippi River.

Then, in regard to these three classes, this opinion decides that those who had gone west before the treaty of 1835, and known as old settlers, were paid off and satisfied by the appropriation above named of $532,869.91 appropriated the 30th of September, 1851, (9 Stats., 556,) this being the fund provided for in the fifth article of the treaty of 1835 for the old settlers specifically, and the opinion holds (pp. 324, 325,) that as these old settlers were specifically provided for by the appropriation of $532,896.91, they were not entitled to any part of the other two appropriations of $189,422.76 and the $724,603.37.

Then this opinion holds (p. 325) that the other two classes of Cherokees, namely, those who continued to reside east up to and after 1846 as one class, and those who at the date of the treaty of 1835 were residing east of the Mississippi, but removed west after the treaty of 1835, are, *taken together as one class*, entitled to the sums contained in the other two appropriations, to wit, the $189,422.76 and the $724,603.37, and the Attorney General (p. 325) expressly holds and decides that these two classes, two wit, those living east in 1846 and those who went west between 1835 and 1846,

were *alike entitled to these two appropriations, aggregating the sum of* $914,026.13.

He holds in regard to the distribution of this fund in the following words:

"The treaty of 1846 does not, expressly nor by implication, abrogate any of the interests of the Cherokees in the distribution per capita provided for in the articles 12 and 15 of the treaty of 1835. The treaty of 1846 intends to provide for the satisfaction of those claims; not to forfeit, repeal, or annul any of them."

On page 326 the Attorney General uses these words in regard to all three appropriations, after saying that these appropriations are "totally disentangled from any questions, or facts, or subjects, of the charges or allowances for removing from the east to the west side of the Mississippi River, or for subsistence or commutation therefor:"

"They are the sums constituting the balance of the *purchase-money* for the lands ceded to the United States, found due by the United States upon the adjustment of the accounts as provided for in the 9th article of the treaty of 1846; all moneys for improvements, ferries, spoliations, removal and subsistence and commutation therefor, debts and claims upon the Cherokee Nation of Indians, for the additional quantity of land ceded to said Nation, and the several sums provided in the several articles of the treaty to be invested as the general funds of the Nation, and also all sums properly allowed and paid under the provisions of the treaty of 1835, have been deducted out of the purchase-money for the lands ceded to the United States by the the treaty of 1835; the balance so found due by the United States was, by the treaty of 1846, to be distributed to the Cherokees in portions between the 'old settlers' or 'Western Cherokees,' and the *other* Cherokees, per capita, to the individuals of each class. The three appropriations under consideration make up that 'balance,' and the acts making the appropriations have apportioned it between the 'old settlers' and the *others*, in the manner agreed by the treaty of 1846."

Thus it is made absolutely plain and indisputable that this opinion is one which decides that the purchase-money paid by the United States for the lands east of the Mississippi River under the treaty of 1835, were made by these three treaties of 1835, 1836 and 1846, construed together, to be the common property of all the Indians, including those who are plaintiffs in the present case.

On pages 328 and 329 he considers whether the Cherokees who remained east in 1846 were to be deprived of their share of this purchase-money, because they had not been found to be qualified to become useful citizens by a certificate of commissioners provided for in the 12th article of the treaty of 1835, (p. 483 of 7th Stats.,) and he decides that such qualification had been waived, that it was impracticable of execution, and concludes by saying in these words, (bottom of p. 328):

"I think it is now too late to question their rights on that ground, and consequently they must be admitted among the distributees."

On page 329 he decides that the treaty of 1846 differed from the treaty of 1835, in that it dispenses with the census "just completed," which is mentioned in the fifteenth article of the treaty of 1835, and holds that the Cherokees residing east are entitled to their per capita of the said purchase-money under the treaty of 1846, which dropped this allusion to a census contained in the treaty of 1835 without regard to any such census, and although they are not the same persons who would have been entitled under the treaty of 1835, and holds that they all took *per capita* and not *per stirpes*.

The material results and principles, therefore, of this opinion of the Attorney-General are as follows:

First. That these treaties, taken together, give to the Cherokees residing east in 1851, the date of this opinion, their equal pro rata share of the balance of the purchase-

money paid for the land ceded in the treaty of 1835, and that nothing done by these Eastern Cherokees up to the date of this opinion has worked any forfeiture of their title to this proportion of said purchase-money.

SECOND. That the title of the individual Cherokees living in the east in 1851, the date of this opinion, was a title which came to them, not by descent from their ancestors living in 1835, but came to them because they were in 1851 members of the Cherokee Nation of Indians, entitled then per capita owing to their being still members of the Nation.

On page 330, in enforcing this view, the Attorney-General says:

"In respect to the land ceded, and the price to be paid for it, the Indian had no heir or representative, (so to speak,) but his Nation; and no interest that he had in the one or the other, when living, passed on his death to his child or to his administrator. There was nothing to pass, for his interest as a person in life and being became extinct with him, and lapsed to his tribe; his children can claim only as members of that tribe in common with all the other members.

"These remarks apply also to the fund to be distributed to the 'old settlers' or 'Western Cherokees.'"

Such then are expressly and conclusively the *principles* of this opinion. These *principles* result in making the Cherokees living in North Carolina in 1851 to be members of the Cherokee Nation of Indians; make their property derived from their lands to pass at their death to the common fund of the Nation; and make every member of the Nation, whether east or west, alike and equal members of the tribe, and entitled as such per capita to participate in the common fund of the Nation, and thus impress upon the lands and the money produced by the sale of lands, alike the quality of being the common property of the entire Cherokee people.

Upon these principles the Executive Department dis-

tributed the money. We will now turn to the legislative action.

Attention is now invited to the provisions of the fourteenth section of the act of August 18th, 1856, (11 Stats. 92,) providing for the payment of $5,000 appropriated to pay Indians omitted from the Siler roll of 1851, of the above named per capita fund to such of the Cherokees as were in 1856 residing east of the Mississippi River, and which act of 1856 affirmatively ratifies "the principles contained in the opinion of the Attorney General of the United States on that subject, dated the 16th of April, 1851."

We have here the political department of the Government expressly legislating into binding force the principles of this opinion. This section 14 is as follows:

"SEC. 14. *And be it further enacted*, That the Secretary of the Interior ascertain the number of Cherokees east of the Mississippi, that were omitted in the census taken by D. W. Siler, in eighteen hundred and fifty-one, and pay the five thousand dollars appropriated by the eighth section of the act making appropriations for the current and contingent expenses of the Indian Department, approved July thirty-first, eighteen hundred and fifty four, to said Indians, according to the *per capita* distribution made by the Department of the Interior, in pursuance of the principles contained in the opinion of the Attorney Genaral of the United States on that subject of April sixteenth, eighteen hundred and fifty-one."

The result of this last named legislation is incontestibly plain, and is as follows:

FIRST. To establish that the political branch of the Government has fixed the principle making the Cherokees east of the Mississippi River in 1856, to be *a part of the Cherokee Nation*, entitled to their proportion of the common property of the Nation, and hence that the judicial branch of the Government has no power to reverse this principle established by the political branch of the Government.

This is decided in the following cases, amongst very many others (see Brief, p. 9):

Scott *v.* Jones, 5 How., 343.
Luther *v.* Borden, 7 How., 1.
Maguire *v.* Tyler, 8 Wall., 650.

And the same thing is decided expressly in regard to there being no power in the court to review any action of the political branch of the Government regarding the status and rights of Indian tribes and the members thereof, in the case of—

The Kansas Indians, 5 Wall., 537, 755, 756, and 769.

The same thing is decided in the case of—

Holabird, 3 Wall., 419.

We have pointed to this opinion of the Attorney General and to this act of 18th August, 1856, for the double purpose of showing that the claimants continued to be Cherokees, and also continued, as such, to hold their rights in the common property of the tribe. We now turn to other considerations showing the same things.

The contention that they had ceased to be Cherokees and had become citizens of the United States is fully answered by the treaty of 1835, which nowhere provides for their becoming citizens of the United States; and also by the supplement of 1836, which contemplates not the acquisition of citizenship of the United States, but a compulsory, if not a voluntary, removal to the west. It is also answered by the treaty of 1846, which, as we have above seen, recognizes their right to remain east, and to be Cherokees, in that the tenth section expressly provides for them as Cherokees, as Indians, and not as citizens.

It is also answered by sections 4 and 5 of the act of July 29, 1848; and this statute, coming as it does immediately after the treaty of 1846, is especially significant.

By section 4 it is provided—

"That the Secretary of War cause to be ascertained the number and names of such individuals and families, including *each member of every family of the Cherokee Nation* of Indians that remained in the State of North Carolina at the time of the ratification of the treaty of New Echota, May 23, 1836, and who *have* not removed west of the Mississippi or received the commutation for removal and subsistence, and report the same to the Secretary of the Treasury; whereupon the Secretary of the Treasury shall set apart, out of any moneys in the Treasury not otherwise appropriated, a sum equal to $53.33 for each individual ascertained as aforesaid, and that he cause to be paid to every such individual, or his or her legal representative, *interest* at the rate of six per centum per annum on such per capita from the said 23d day of May, 1836, to the time of the passage of this act, and continue annually thereafter said payment of interest at the rate aforesaid."

This section not only treats them as members of the Cherokee Nation who yet remain east of the Mississippi River, but deals with them as such, and a fund is set apart for them, and interest is to be paid on that fund from 1836 onward.

Then section 5 provides—

"That whenever hereafter any individual or individuals of said *Cherokee Indians* shall desire to remove and join the tribe west of the Mississippi, then the Secretary of War shall be authorized to withdraw from the funds set apart as aforesaid, the sum of $53.33 and the interest due and unpaid thereon, and apply the same or such part thereof as shall be necessary to the removal and subsistence of such individual or individuals, and pay the remainder, if any, or the whole, to such individuals or heads of families upon their removal west of the Mississippi; provided that the amount herein required to be funded for the benefit of the said Cherokees in North Carolina, and the amount required to be paid them, shall be charged to the general Cherokee fund under the treaty of New Echota, and shall be reimbursed therefrom."

It seems to us that a more complete refutation of the contention that these Indians had, in 1848, ceased to be members of the Cherokee Nation by reason of non-removal, and had lost rights by reason of non-removal, could not be made.

The contention that claimant Indians had ceased to be members of the Cherokee Nation is also answered by section 4 of the act of March 3, 1855, (10 Stats., 700,) by authorizing the payment of per capita allowance to such Cherokees *east* of the Mississippi as were omitted on the roll of D. W. Siler, made pursuant to the act last referred to; thus dealing with them as Indians, and not as citizens of the United States.

It is also answered by the act of 1856, (11 Stats., 92,) above alluded to, whereby the principles of the Attorney General's opinion are enacted in the statute, in which opinion he asserts that they are Cherokees, that they are entitled to take per stirpes and not per capita, and that it is too late to call in question their rights as such.

It is also answered by the act of 1868, (15 Stats., 228,) the second section of which provides that the Secretary of the Interior shall cause a new roll or census to be made of the North Carolina or Eastern Cherokees, which shall be the roll upon which payments due said Indians shall be made. And section 3 provides, "that hereafter the Secretary of the Interior shall cause the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians."

It is also answered by the act approved July 15, 1870, (16 Stats., 362,) the 11th section of which provides, "that the Eastern band of Cherokee Indians by that name and style be, and they are hereby, authorized and empowered to institute and carry on a suit or suits in law or equity in the District or Circuit Courts of the United States against the present or former Indian Agent," &c. This not only recognizes them as Indians in terms, but it indirectly affirms that they are not citizens of the United States, because if

they were citizens of the United States there would have been no occasion to grant them authority to bring suits. As citizens of the United States they would have had that authority without this act of Congress; and in this connection it may be remarked that that suit was brought, and the result of it was a recovery of the lands therein referred to by them *as a band or tribe of Indians, and the lands recovered by them are now held by the Commissioner of Indian Affairs in trust for this band or tribe of Indians.*

It is also answered by the act approved August 7, 1882, (22 Stats., 328,) which appropriates to employ an agent for the Eastern band of the Cherokee Indians, and to enable the Secretary of the Interior to cause a census to be taken and a new roll made of these Indians, and, what is particularly to be noted, requires the Secretary to investigate and report to Congress what, in his opinion, would be an equitable settlement of all matters of dispute between the Eastern band of Cherokee Indians, including all the Cherokees residing east of the Mississippi River, and the Cherokee tribe or nation west, and what sum or sums of money, if any, should, in his opinion, be paid under such settlement, and the sum of $2500 is appropriated for such investigation.

And it likewise provides for paying the expenses of the delegates representing the Eastern band of the Cherokee Indians while in the city of Washington, &c.

It is also answered by the act of March 3, 1883, whereby Congress authorized these Eastern Cherokees to bring this suit in the Court of Claims, and authorized that court and this court on appeal to make a decree in their favor for whatever might be equitably due to them on account of these funds; and thus, continuously, Congress has legislated in respect of them as Indians, dealt with them as such, treated them as such, and not as citizens of the United States, and has dealt with them and treated them as Indians, who of right were remaining where they now are.

This action of Congress in thus dealing with these Eastern Cherokees as Indians, making appropriations for them, requiring the Secretary to take charge of them, dealing with them as Indians in every way continuously from 1846 down to 1882, is utterly and wholly inconsistent with the proposition that they had ceased to be Indians and had become citizens of the United States. If they had become citizens of the United States, as asserted by the Court of Claims, and had ceased to be Indians, then upon what principle, or by what authority, could the United States organize them into a band of Indians? If, under the operation of the treaty of 1835–36, or the treaty of 1846, or any other treaty, they had ceased to be Indians and had become citizens of the United States, it can hardly be pretended that the Government could again make Indians of them and organize them into a tribe or band; but, as before said, Congress not only has always dealt with them as Indians, but it enacted this law of 1868 by which the Secretary was required to take charge of them as the Eastern band of the Cherokees, and by the other act referred to conferred upon them as such the authority to bring suit to recover lands that they were equitably entitled to, and has likewise authorized them to bring this action as such band.

We have, therefore, not only these treaties, in which they are dealt with as Indians, and Cherokee Indians, but this action of the Legislative and Executive Departments of the Government, recognizing them as such.

Effect of Political Recognition.

The result of this is that the political departments of the Government have recognized them as a part of the Cherokee people, and of right remaining where they are. The courts are bound to adopt and follow this *political recognition.*

The authorities on this subject are collected in our brief at p. 9.

In the Holliday case, 3 Wall., at p. 419, this court said:

"In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the Government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same."

This court held in that case that Congress had the right to regulate the traffic in spirituous liquors with any Indian tribe or any *member* of the tribe "without reference to the locality of the tribe or of the *member* of the tribe."

And further held that neither the constitution of the State not any act of its legislature, however formal or solemn, whatever rights it may confer on those Indians, or withhold from them, can withdraw from them the influence of an act of Congress, which that body has the constitutional right "to pass concerning them."

In the case of Phillips *v.* Payne, 92 U. S., at p. 132, this court said, that "in cases involving the action of the political departments of the Government, the judiciary is bound by such action," in support of which numerous authorities are cited.

The same doctrine is asserted in *United States* v. *Lee*, 96 U. S., p. 209.

This action of Congress and of the Executive—the political departments of the Government—we submit effectually disposes of the claim that these Indians have become citizens of the United States or of North Carolina, or ceased to be Indians under the control of the United States.

The Laws of North Carolina.

The claim has been, and possibly again will be made, that the laws of North Carolina fix the status of these people. The Court of Claims said that this Eastern band is only a "social organization," and also said that "Congress can

make no laws in relation to the band which are in conflict with the laws and constitution of the State of North Carolina, to which these Indians are subject."

But this court held in the case of Holliday, (3 Wall., p. 419,) just the contrary, as we have quoted.

HAVE THE CLAIMANT INDIANS ANY INTEREST IN THE PROPERTY IN CONTROVERSY, LEGAL OR EQUITABLE?

While this is the very question in controversy, its solution depends upon several considerations, which we will present in their order.

First. They are descendants of the original Cherokee people. Their ancestors were of those who resided east of the Mississippi River in 1835. It was lands occupied by them when that treaty was made that were ceded by that treaty. These lands produced the $5,000,000, part of which was applied in payment for the 800,000 acres already alluded to. The lands theretofore ceded, and which alike were owned by their ancestors, were given in exchange for other lands west, before mentioned.

Undeniably all the property in question was procured with money and land which was the common property of this entire people, and unless something has occurred by reason of which the principle does not apply, they are equitably entitled to their share of the proceeds of this property, to the purchase of which they had contributed.

Second. The United States assented to their remaining where they were, and could not well have done otherwise, because, as will appear by reference to all the treaties prior to 1835, these Cherokee Indians had submitted themselves unreservedly to the jurisdiction of the United States, and the United States had placed itself under the most solemn obligations to protect them in their possessions against the encroachments of citizens of the United States.

When in 1809 some of them desired to go to the west,

and some to remain east, the President, as is recited in the preamble to the treaty of 1817, gave the assurance that "those who *remain* may be assured of our patronage, our aid, and good neighborhood." Here the assent to remain is clear.

Then, in article 5, the United States bind themselves in exchange, &c., to give to *that part* of the Cherokee Nation on the Arkansas, &c., as much land on that river and White River as was received from the Cherokee Nation east of the Mississippi River, acre for acre, &c.

This is again an assent to their remaining, and although there was a geographical separation they constituted one people.

The treaty of 1819 in the first words of its preamble expresses the assent to remain in these words:

"Whereas the greater part of the Cherokee Nation have expressed an earnest desire to remain on this side of the Mississippi, and being desirous in order to commence those measures necessary to the civilization and preservation of their nation," etc.

In the preamble to the treaty of 1828 this assent is again given in the expression of the desire of the Government to "secure to the Cherokee Nation of Indians, as well those now living within the limits of Arkansas as those of their friends and brothers who reside in States east of the Mississippi, and who *may wish* to join their brothers of the west," etc.

The treaty of 1835 expressly recognized the right to remain in Art. 12, and secured to those who elected to do so, their interests in the moneys and reservations of lands.

Never until the supplement of 1836 was there dissent or any effort on the part of the Government to compel them to remove.

The language in which this was done is found in the preamble to this supplement and is most significant:

"And whereas the President of the United States has

expressed his *determination* not to allow any pre-emptions or reservations, his desire being that the *whole Cherokee people* should remove together and establish themselves in the country provided for them west," etc.

The Thomas agreement in connection with this treaty has already been alluded to, which shows that this treaty of 1835 was not regarded as compelling removal.

The efforts that were made to enforce removal after this treaty form one of the darkest pages in our Indian history.

The hostile legislation of the States, the military power of the Government, were used remorselessly and relentlessly to force them from their homes. They secreted themselves to avoid this coercion. They were hunted from their hiding places, but, notwithstanding all efforts to the contrary, many of them refused to go; they eluded all pursuers and clung to their homes, and there they were at the making of the treaty of 1846, and by that treaty the United States again assented that they might remain, for by Art. 10 it is provided that nothing in that treaty is to be so construed as to "take away or abridge any rights or claims which the Cherokees *now* residing east," etc.

Following this are the acts of Congress providing for their settlement, authorizing them to sue their agent for their lands, directing their supervision by the Commissioner of Indian Affairs, directing the Commissioner to take a census and to report what interest they had equitably in the property in question.

That report is Executive Document No. 79, 47th Congress, 2d session. It was made in pursuance of the requirements of the act of Congress of August 7th, 1882, above referred to, requiring the Secretary of the Interior to ascertain and report what, if any, legal or equitable interest these Indians had in the property in question. This document takes up this entire subject, reviews it in detail,

and the Commissioner reports that they have an equitable interest in this property, and the Secretary of the Interior approves that conclusion and submits the report and accompanying papers to Congress.

This report is followed by the act of Congress conferring the jurisdiction under which this cause is proceeding. In the light of all this it must be concluded that the United States have assented that the claimant Indians might remain where they now are.

Third. Have they lost their equitable interest by not removing?

It seems to us to be plain that these treaties comprehend the entire Cherokee people; that they embrace these claimants. "The whole Cherokee people" is so often repeated in these treaties, whether made with those east alone or with those west alone, and whether made with the one or the other, embracing the property interests of both, it is impossible to exclude any Cherokees, no matter where they might be situated.

The all pervading spirit of all these treaties since the first separation of the tribe is to secure to all ratably their share of the common property. The United States, the guardian of this property, could do no less than this, and cannot be held to have intended to do otherwise, unless the language of the treaties is so plain, explicit, and compelling that no other construction is admissible.

There is no such language. In 1846 these claimant Indians were still in North Carolina. They had refused to remove. Yet in every part of that treaty it is manifest that equal and exact justice to all, including claimants, was contemplated.

Nowhere in that treaty is there any expression of any forfeiture of any interest by a failure to go.

Is it not fair to assert that if there had been any such purpose it would have been expressed unmistakably?

Is it not just to the United States to say that if it intended to forfeit these interests as a penalty for not leaving their homes, notice would have been given to that effect by a plain provision of the treaty?

Doubtful and uncertain phrases will not avail in treaties with Indians to strike down equities such as exist in this case.

Such treaties are most liberally construed in favor of the Indians.

There is not only no such provision, but the spirit of the treaty is against any such construction, and the tenth article preserves those rights.

But, as we have said in another connection, the legislature on the 18th of August, 1856, said, by affirming the Attorney General's opinion, that it was too late to assert that they had lost anything by this non-removal, (5 *Opins.*, *supra*.)

We therefore submit that there is nothing in any of these treaties by which their rights are forfeited.

Fourth. MUST THEY REMOVE WEST IN ORDER TO ENJOY THESE RIGHTS?

It is not so provided in any of the treaties to which reference thus far has been made.

If so declared, that declaration or provision must be found in THE TREATY OF 1866.

This is a treaty made after the Cherokees west had been in rebellion. Amnesty was granted them by it.

Sales of lands were authorized, and under that authority sales were made, and the proceeds of those sales, invested and now held by the United States, are the funds in controversy in this case. The proceeds of the sale of the 800,000 acres purchased with part of the $5,000,000, are part of these funds held by the United States.

It is insisted that these claimants are precluded from having any part of these moneys, because article 23 directs

that funds that may accrue from the sale of lands shall be invested, and the interest arising therefrom shall be paid on the order of the Cherokee Nation, thirty-five per cent. for schools, fifteen per cent for orphans, and fifty per cent. for general purposes.

It is insisted that because the United States made this treaty of 1866, with those Cherokees who were then west of the Mississippi River, and dealt with all this property in that treaty, and provided for placing the same in a fund, the interest on which was to be paid on the order of the Cherokee Nation, therefore these North Carolina Cherokees are excluded from participation in that fund. We have seen before that in making treaties with these Indians the United States has dealt indifferently, sometimes with those east, sometimes with those west, and yet whether dealing with those east or those west has embraced them all, and the property of all, in those treaties. In other words, when it made a treaty with those east it was regarded as being a treaty with the whole Cherokee Nation or people. When it made a treaty with those west it was regarded in the same way. (19 Howard, 366.)

The same principle therefore must apply in the interpretation of the treaty of 1866. True it was made with the Cherokees west of the Mississippi, but it is equally true that although made with those west, yet, just as in the case of the other treaties, it embraced these North Carolina Cherokees; and when it dealt with the common property of the whole Cherokee people as recognized in all the treaties and statutes which we have before alluded to, and when it made a fund for this Nation arising out of the sale of this property which was the product of the common property of this entire people, it made that fund not merely for those who were west.

The geographical division of this tribe had been made, and continued throughout all these years with the assent of the Indians themselves, and with the assent of the United

States as we have before shown. But now the claim is that because of this geographical division, and because the United States has seen fit to make a treaty with those who were west and has created this fund which it holds in trust, and has said that these moneys shall be paid out on the order of the Cherokee Nation, therefore these Cherokees west, with whom this treaty was made, may order this money to be paid out for their own sole and exclusive benefit, and exclude from all participation in it those Cherokee Indians who are geographically separated from them. In other words, that this equity resting in the North Carolina Cherokees has by this treaty been destroyed.

These North Carolina Cherokees have been organized into a band by the Government. Under this organization they have their government, their schools, their delegates, &c. Now, it is this maladministration on the part of the Western Cherokees in appropriating this money to their exclusive benefit, and in refusing to set apart their pro rata proportion of it to these North Carolina Cherokees, of which we complain; and it is the purpose of the act of Congress under which this litigation is proceeding to compel a proper division between these respective parts of this Nation. They are one people divided, as expressed in the language of some of these treaties, geographically into "two parts." One of these parts has under its control moneys which belong to the whole. It is one Nation, a part of which, by the authority of the United States, is residing in a different locality from that of the other. By the authority of the United States each one of these parts conducts its own affairs. Each one of these parts, subject to the supervision of the United States, controls its own immediate concerns; and without doing violence to equity and justice the moneys derived from the common property of all cannot be appropriated to the one part to the exclusion of the other part; and especially is this so since the

United States has assented that this geographical separation may be made and continued.

But we contend that in addition to the equities arising out of the fact that these moneys are the result of their common property, they are preserved by the thirty-first article of this treaty of 1866, the last clause of which is as follows:

"And nothing herein shall be construed as an acknowledgment by the United States or as a relinquishment by the Cherokee Nation of any claims or demands under the guarantee of former treaties, except as herein expressly provided."

Those treaties covered this entire Cherokee people. Every interest secured by those treaties is preserved by this article, and it therefore preserves the rights of these claimants to their share of these funds. (For a further discussion of the treaty of 1866, see Brief, pp. 45–47, inclusive.)

POWER OF THE UNITED STATES OVER INDIAN FUNDS.

It is undoubtedly within the power of the United States as the sovereign and as the guardian of Indians to so administer the funds held by the United States in trust for them as to do justice. It is within the power of the United States now to enforce equity as between these contending portions of this tribe. Treaties with Indians are now forbidden by law. Whatever the United States does in the administration of the funds of Indians must now be done by statute, and therefore by the enactment of a law it is within the power of the United States to distribute these moneys according to equity; and in the submission of this case to the Court of Claims and to this Court, Congress has asserted that right, and has made provision for ascertaining what is equity as between these Indians, and has authorized the court to enforce that equity

by its decree. And therefore this act of Congress amounts to, or in effect is, an assertion of the right to administer these funds, notwithstanding they are by the treaty of 1866 payable on the order of the Cherokee Nation. The equity that we assert here on behalf of these claimants is that which arises out of facts that cannot, we submit, in view of what has been gone over, be successfully controverted, namely, that these moneys, including the $214,000 commuted annuities, were derived from the sale of property in which these claimants had a common interest; that they are still Cherokee Indians, a part of the Cherokee Nation; that they are geographically separated from the defendant Indians with the assent of the United States and by authority of the United States, and under its supervision are an organized band of the Cherokee Nation; that for their share of these moneys they have never in any way, directly or indirectly, received any equivalent whatever.

It is no answer to this, we submit, to say that the United States desired them to remove. However strong that desire may have been, the assent to remain was nevertheless given.

Nor is it any answer to say that they can now enjoy this property by removing west.

Much less is it an answer to say that it separates these funds, and deprives the Western Cherokees of a part of them. Such a suggestion does not meet the case.

While it is true that the Government sought their removal by the treaty of 1835–6, and endeavored to enforce it afterwards, it is equally true that that policy was abandoned, and one more humane, and that was demanded by the legal, equitable, and moral obligations resting upon the Government, was adopted—the assent to remain—conceded by the treaty of 1846, and acted upon by the political departments now for thirty years.

Nor is the suggestion of the Court of Claims, that to grant this claim would be to establish the principle that some of

those west might go off to Leadville or elsewhere and establish themselves, and then demand a division, any answer. Such a case, we submit, has no similarity to this—that would be a severance without right, while this is a geographical severance sanctioned by the political power of the Government.

And let it not be forgotten, if this severance is to be deemed material, that such severance is one not accomplished by claimant Indians departing from the ancient home of the Nation, but is, on the contrary, ratified and sanctioned by the Government's act in allowing them to remain in such ancient home; such allowance by the Government as evinced in the treaty of 1846, and the legislation above alluded to, being an abandonment of that treatment of the Nation which wrested the majority from their home, and which treatment is pronounced by all historians, and in effect by the Supreme Court of the United States, (5 Pet., 1–80,) as the most disgraceful in our Indian history.

Seventy-five years ago the ancestors of these claimants went to the President of the United States and proclaimed their desire to cultivate the arts of civilization side by side with the white man, and in the land they and their ancestors had occupied long before a white man had seen this continent.

They had the pledge of the President that they might remain, and that the friendship and assistance of this Government should be extended to them in this effort at advancement, and should be extended to them there.

Though afterwards coerced into a cession of every foot of land thus pledged to them, and hunted and harried and oppressed, they have struggled on in their effort to accomplish the purpose so long ago avowed by them to abandon the wild life of the hunter for the ways of civilization.

With the little pittance of money received by them they have bought back again 70,000 acres of their native hills and plains, the title to which this Government holds in trust

for them, and where they have their homes, and maintain their schools and churches, and are still bravely and honestly maintaining their purpose expressed three-quarters of a century ago.

In this effort they only ask the aid of what we submit it is unconscionable to deny them, their fair share of what is undeniably, equitably theirs, and for which they have never received an equivalent.

It is impossible to do injustice by granting their prayer in this case.

Samuel Shellabarger
J. M. Wilson,
Samuel J. Crawford,
J. H. Gilkpatrick,
Attys for Claimants.

117-28

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JAMES. H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1885.—No. 886.

THE EASTERN BAND of the CHEROKEE INDIANS,
APPELLANTS.

vs.

THE UNITED STATES and the CHEROKEE NATION,
APPELLEES.

APPEAL FROM COURT OF CLAIMS.

Brief for Appellee, The Cherokee Nation.

WILLIAM A. PHILLIPS,
Attorney for the Cherokee Nation.

S. S. BURDETT,
Of Counsel.

In the Supreme Court of the United States.

October Term, 1885.—No. 886.

The Eastern Band of the Cherokee Indians, *Appellant*,

vs.

The United States and the Cherokee Nation.

Appeal from the Court of Claims.

Brief for the Appellee, The Cherokee Nation.

Statement of the Case.

The claim set up is proportionate right and ownership in two funds, the property of the Cherokee Nation held by the United States in trust.

The funds are:—

1st. That created by Article 11 of the treaty with the Cherokee Nation, entered into December 29, 1835, at New Echota in the State of Georgia (7 Stats., 478), amounting to $214,000, and commonly called the commuted annuity fund.

2d. A fund arising and to arise out of the sales of certain lands of the Cherokee Nation. The *pro rata* share demanded is the one-seventh part of the whole of each of these funds with interest.

The right of recovery is based on the allegations, following:

1st. That the appellant and the Cherokees residing east of the Mississippi river are a part of the Cherokee Nation of Indians. Petition, Record, p. 2.

2d. That the Cherokee Nation, theretofore one people, by certain treaty stipulations entered into between the United States and that Nation, "became divided into two parts or bands known respectively as the Eastern Band of the Cherokee Nation and the Cherokee Nation West." That the division so agreed upon and resulting continues, and that the appellant is that Eastern Band which by that means was brought into existence. Record, p. 5.

3d. That the appellant has been and is fully recognized by the Executive and Legislative Departments, and by the treaty making power of the Government of the United States, as members of the Cherokee Nation and as a separate band of such Nation by the legislative action of the United States. Record, p. 5, 6.

4th. Upon the proofs it is alleged that by an agreement made in the year 1836 between William H. Thomas, as attorney in fact for certain citizens of North Carolina of Cherokee blood, and certain representatives of the Cherokee Nation, the rights now asserted by the appellant or some of them accrued.

I.

The facts with relation to the organization, existence and status of the Cherokee Nation are summarized in finding No. IV. (Record, p. 50.) The general facts are that by the treaty of Hopewell concluded November 28, 1785 (7 Stat., 18), the Cherokees were recognized as constituting an Indian Nation. The treaty was with "all the Cherokees." This recognition of them, and as constituting one Nation, was renewed by the treaties proclaimed February 7, 1792 (7 Stat., 39); February 17, 1792 (Id., p. 42); January 21, 1795 (Id., p 43); October 2, 1798 (Id., p. 62); May 17, 1824 (Id., p. 228); April 24, 1806 (Id., 93); June 10, 1806 (Id., 95); May 23, 1807 (Id., p. 101); April 22, 1808 (Id., 103); April 8, 1816 (Id., 138, 139); December 30, 1816 (Id., 148).

The treaty proclaimed December 26, 1817 (7 Stat., 156), was with the as yet undivided Cherokee Nation. It recognized the fact that a portion of the Cherokee people had settled beyond the national borders at a place west of the Mississippi river, recited the causes of that fact, provided for the acquisition of land for their use, and a basis of settlement and division of the annuities of the nation. The treaty proclaimed March 10, 1819 (7 Stat., 795), was with the Cherokee Nation. It provided finally for the apportionment (Art. 6) of the annuity between "the Cherokees east of the Mississippi" and "the Cherokees west of that river." These treaties (1817 and 1819) had created the conditions necessary to the founding of a Cherokee State west of the Mississippi. The treaty proclaimed May 28, 1828 (7 Stat., 311), was with the "Cherokee Nation of Indians West of the Mississippi river."

That proclaimed April 12, 1834 (7 Stat., 414), was with the same Nation.

The larger portion of the Cherokee people, at the date of the proclamation of the treaties with the Nation West of the Mississippi, remained within their ancient borders, and without interruption retained their position and powers as an Indian State.

There were, therefore, since the treaty of 1828, two Cherokee Nations, with each of which the United States held treaty relations. The country of one was to the eastwards of the Mississippi, that of the other was to the westward of that river.

This was the unquestioned fact when, on the 29th day of December, 1835, a treaty was concluded at New Echota, in the State of Georgia (7 Stat., 478), whereby the Cherokee Nation East sold to the United States "all the lands owned, claimed or possessed by them east of the Mississippi river" (Art. 1), and agreed within two years to remove to the lands of the Cherokees West of the Mississippi. Art. 16.

Subsequent to that of New Echota, there were three treaties negotiated with the Cherokees; that proclaimed August 17, 1846 (9 Stat., 871), which was with the reunited Nation, and had in view the settlement of all differences growing out of their former separation into two Nations, and those of July 19, 1866 (14 Stat., 799), and April 27, 1868 (16 Stat., 727), both of which were with the Cherokee Nation of Indians.

The Cherokee Nation East did remove to their new homes west of the Mississippi, as provided in said Article 16 of the Treaty of New Echota.

Scott's Autobiography, Vol. 1, pp. 317–330.
Report No. 1098, Ho. of Reps., 27 Cong., 2d Sess.

Upon the reunion of the Cherokee people on their lands West of the Mississippi, consequent upon the execution of the Treaty of New Echota, the following "*Act of Union between the Eastern and Western Cherokees*" was entered into:

"WHEREAS, our fathers have existed as a separate and distinct Nation, in the possession and exercise of the essential and appropriate attributes of sovereignty, from a period extending into antiquity, beyond the records and memory of man; *and whereas*, these attributes, with the rights and franchises which they involve, remain still in full force and virtue; as do also the national and social relations of the Cherokee people to each other, and to the body politic, excepting in those particulars which have grown out of the provisions of the treaties of 1817 and 1819, between the United States and the Cherokee Nation, under which a portion of our people removed to this country, and became a separate community (but the force of circumstances have recently compelled the body of the Eastern Cherokees to remove to this country, thus bringing together again the two branches of the ancient Cherokee family), it has become essential to the general welfare that a union should be formed and a system of government matured, adapted to their present condition, and providing equally for the protection of each individual in the enjoyment of all his rights.

"*Therefore*, we, the people composing the Eastern and Western Cherokee Nation, in national convention assembled, by virtue of our original unalienable rights, do hereby solemnly and mutually agree to form ourselves into one body politic, under the style and title of the *Cherokee Nation*.

"In view of the union now formed, and for the purpose of making satisfactory adjustments of all unsettled business which may have arisen before the consummation of this union, we agree, that such business shall be settled according to the provisions of the respective laws under which it originated, and the courts of the Cherokee Nation shall be governed in their decisions accordingly. Also, that the delegation authorized by the Eastern Cherokees to make arrangements with Major-General Scott, for their removal to this country, shall continue in charge of that business, with their present powers, until it shall be finally closed. And, also, that all rights and titles to public Cherokee lands on the east or west of the river Mississippi, with all other public interests which may have vested in either branch of the Cherokee family, whether inherited from our fathers or derived from any other source, shall henceforward vest entire and unimpaired in the Cherokee Nation, as constituted by this Union."

September 6, 1839, the reunited Nation adopted a constitution, the first clause of the Preamble of which is in the following words: "The Eastern and Western Cherokees having again reunited, and become one body politic, under the style and title of the *Cherokee Nation*: Therefore."

Report No. 1098, Ho. of Reps., 27 Cong., 2d Sess. pp. 73-4.

Laws of Cherokee Nation, page 10, ed. of 1881.

II.

The facts with relation to the organization, existence and composition of the Appellant Band, are:

That by article 8 of the treaty with the Cherokee Nation, proclaimed December 26, 1817 (7 Stat., 159), the

United States agreed to give to every head "of any Indian family residing on the East side of the Mississippi river, on the lands that are now, or may hereafter be surrendered to the United States, who may wish to become citizens of the United States, a reservation of six hundred and forty acres of land, * * *"

This provision was repeated by Article 2 of the treaty proclaimed March 10, 1819 (7 Stat., 196).

Article 12 of the Treaty of New Echota (7 Stat., 483), concluded December 29, 1835, provides:

"Those individuals and families of the Cherokee Nation that are averse to a removal to the Cherokee country west of the Mississippi, and are desirous to become citizens of the States where they reside, and such as are qualified to take care of themselves and their property, shall be entitled to receive their due portion of all personal benefits accruing under this treaty for their claims, improvements and per capita; as soon as an appropriation is made for this treaty."

Under these treaty provisions with respect to citizenship, there remained East of the Mississippi, immediately after the general removal incident to the treaty of 1835–36 (7 Stat., 478), between 1,100 and 1,200 persons, some of whom have since joined the Nation West. Finding No. 1, Record, p. 48.

The organization of the appellant as now claimed to exist, is set out in findings of fact No. 1. Record, pp. 42 to 49.

The relations of the individuals composing the claimant and appellant band, in the matter of their citizenship of the States, of their residence, is set out in the same finding No. 1, at Record, p. 49.

The number of persons now composing the claimant band, and the status of their residence, is set out in finding No. 7, Record, p. 51.

III.

The facts relating to the origin, investment and disposal of the "Commuted Annuity Fund," which is one of the objects of appellant's claim, are :

That by the treaty proclaimed February 7, 1792, Article 4, and that proclaimed February 17, 1792 (7 Stat., 39–42), in consideration of the relinquishment of certain of their lands, the United States agreed to pay annually to the "Cherokee Nation of Indians" one thousand five hundred dollars.

The treaty of 1794 (7 Stat., 43), increased the annual payment to $5,000; that of 1798 (7 Stat., 63), added $1,000; the treaty of 1804 (7 Stat., 228), added another $1,000; and the treaty of 1805 (7 Stat., 93), to these amounts, added $3,000. The annuities thus reached in 1805, $10,000; they remained at that sum until the date of the treaty of December 29, 1835 (7 Stat., 478), when the following was agreed to :

"Article 11. The Cherokee Nation of Indians believing it will be for the interest of their people to have all their funds and annuities under their own direction and future disposition, hereby agree to commute their permanent annuity of ten thousand dollars for the sum of two hundred and fourteen thousand dollars, the same to be invested by the President of the United States as a part of the general fund of the Nation; * * *"

"Article 10. The President of the United States shall invest in some safe and most productive public stocks of the country for the benefit of the whole Cherokee Nation who have removed or shall remove to the lands assigned by this treaty to the Cherokee Nation West of the Mississippi, the following sums as a permanent fund for the purposes hereinafter specified, and pay over the net income of the same annually to such person or persons as shall be authorized or appointed by the Cherokee Nation to receive the same, and their receipt shall be a full discharge for the amount paid to them, viz., the sum of two hundred thousand dollars in addition to the present annuities of the

Nation, to constitute a general fund, the interest of which shall be applied annually by the council of the Nation to such purposes as they may deem best for the general interest of the people * * *"

The act of Congress approved July 2, 1836 (5 Stat., 73), appropriated the said sum of $214,000 in declared satisfaction of the said eleventh article.

The net income of the investment has been regularly appropriated. Instance Act, approved March 3d, 1875. 18 Stat., 448.

The disposition of the funds then due the Cherokee Nation, and thereafter to accrue, was considered and provided for in Article 23 of the treaty concluded July 19, 1866. 14 Stat., 805.

The said act approved March 3d, 1875, authorized the United States Assistant Treasurer at St. Louis, Missouri, to open and keep accounts with the duly constituted Treasurer of the Cherokee Nation, the same as with Government agents and disbursing officers. 18 Stat., 448.

The Constitution of the Cherokee Nation, adopted September 6, 1839, provides, Art. 4, Sec. 24, p. 21: "It shall be the duty of the treasurer to receive all public moneys and to make a regular statement and account of the receipts and expenditures of all public moneys at the annual session of the National Council."

Laws of Cherokee Nation, Edition of 1881.

Finding No. V, Record p. 50, contains the conclusion of the Court below as to the facts on this head.

IV.

The facts relating to the lands of the Cherokee Nation and the proceeds of the sales of certain of them claimed by the appellant, are:

The ancient estate of the Cherokees was to the Eastward of the Mississippi and their lands there situated were

held by their original right of occupancy and possession.
Treaty of November 28, 1785. (7 Stat., 18).
Cherokee Nation *vs.* State of Georgia. (5 Pet., 1).

By the treaty of 1817 (7 Stat., 156) certain of the lands east were ceded to the United States (Arts. 1 and 2). By Article 5, in exchange for the lands so ceded the United States was bound "to give to that part of the Cherokee Nation on the Arkansas as much land on said river and White River as they have or may hereafter receive from the Cherokee Nation east of the Mississippi acre for acre, as the just proportion due that part of the Nation on the Arkansas agreeably to their numbers."

The Treaty of February 27, 1819, Art. 1 (7 Stat., 195) made a further cession of Eastern lands to be "in full satisfaction of all claims which the United States have on them, on account of the cession to a part of their Nation who have or may hereafter emigrate to the Arkansas."

By the Treaty entered into May 6, 1828, between the United States and the Cherokee Nation of Indians west of the Mississippi, Article 7 (7 Stat., 313), the Indians gave up and surrendered to the United States all of the lands in Arkansas, that is all lands theretofore ceded to them or to any Cherokees west of the Mississippi, and there was agreed to be conveyed to them in lieu thereof and to such of their friends and brothers who reside in States east of the Mississippi and who may wish to join their brothers of the West, for a permanent home, that tract of land (substantially) which constitutes the present Cherokee Country in the Indian Territory.

The Treaty of February 14, 1883, with the Western Nation provided for a rectification of the boundaries of the tract ceded by the Treaty of 1828, and thereupon declared "and Letters-Patent shall be issued by the United States as soon as practicable for the land hereby guaranteed. 7 Stat.. 414, Art. 1.

The Treaty of December 29, 1835, (7 Stats., 478) was with the Cherokees East. By Sec. 1, all of the lands owned, claimed or possessed by them east of the Mississippi River were ceded, relinquished and conveyed to the United States for the consideration of $5,000,000.

Article 2 recited and confirmed the grant and promise of patent contained in the Treaties of May 6, 1828, and February 14, 1833, and because of apprehension on the part of the Cherokees that the grant so made did not contain "a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi," the United States for the consideration of $500,000, agreed "to convey to the said Indians and their descendants by patent in fee simple" an adjoining tract containing about eight hundred thousand acres of land. Article 3 provided that both of the tracts—that ceded by the Treaty of 1833 and that ceded by the present treaty—"shall be included in one patent, executed to the Cherokee Nation of Indians by the President of the United States. * * *"

The patent was executed on the 1st of December, 1838. Holden *vs.* Joy, 17 Wall., p. 246.

The Constitution of the Cherokee Nation, adopted September 6, 1839, contains the following:

"ARTICLE I,

"Sec. 1. The boundary line of the Cherokee Nation shall be that described in the Treaty of 1833, between the United States and Western Cherokees, subject to such extension as may be made in the adjustment of the unfinished business with the United States.

"Sec. 2. The lands of the Cherokee Nation shall remain common property; but the improvements made thereon, and in possession of the citizens of the Nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be, in posession of them: *Provided*, that the citizens of the Nation possessing exclusive and indefeasible right to their improvements, as expressed in this article, shall possess no right or power

to dispose of their improvements, in any manner whatever, to the United States, individual States, or to individual citizens thereof; and that, whenever any citizen shall remove with his effects out of the limits of this Nation, and become a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease: *Provided, nevertheless*, that the National Council shall have the power to readmit, by law, to all the rights of citizenship, any such person or persons who may, at any time, desire to return to the Nation, on memorializing the National Council for such re-admission."

Laws of Cherokee Nation, Edition of 1881, p. 10.

(For Articles of Union and Constitution of 1839, see also Report No. 1098, H. of Reps., 27 Cong. 2d Session, p. 73, *et seq*).

"Art. III, Sec. 20. All acknowledged treaties shall be the supreme law of the land, and the National Council shall have the sole power of deciding on the construction of all treaty stipulations. Laws, &c., page 16.

The treaty of August 6, 1846 (9 Stat., 871) was mainly for the settlement of disagreements between the Eastern and Western Cherokees, growing out of the occupancy and claim of right in the Western lands by the emigrated Eastern Cherokees. The preamble declared the existence of the difficulties.

Article 1 provided that the lands in controversy "now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit;" and that a patent issue for the same "in conformity with the provisions relating thereto, contained in the third article of the treaty of 1835."

The provisions of said Article 3 was that the patent should issue to "Cherokee Nation of Indians." 7 Stat., 480.

The treaty of July 19, 1866 (14 Stat., 799), provided for disposal of parts of the Cherokee National domain out

of which the consideration money arose, which is in part claimed by the appellant.

Article 15 provided for sales east of 96°, to *civilized* Indians of *interests* in that portion of the National Estate if such Indians should abandon their own tribal organization and of specific tracts if they retained such organization.

Article 15 provided for sales west of 96° to such *friendly* Indians as the United States might wish to settle there, of tracts to be duly ascertained as to quantity and boundary.

Article 17 ceded to the United States in trust, to be thereafter sold for the benefit of the Nation, that tract of land containing 800,000 acres, which was sold to the Cherokees under the provisions of the second article of the treaty of 1835. (7 Stat., 479), and a strip of land, which upon the final establishment of the southern line of the State of Kansas, was found to be in that State.

Article 23 provided for the investment of all the National funds, including those to be derived from the sales of lands, in the registered stocks of the United States an l ordered that the interest be paid semi-annually on the order of the Cherokee Nation.

These provisions of the treaty of July 19, 1866, have been carried into effect by act of May 11, 1872, (17 Stat., 98); act of June 16, 1880, (20 Stat., 248); March 3, 1881, (21 Stat., 422); March 3, 1883, (22 Stat., 624.)

Payments have been made to the Cherokee Nation out of these invested funds, among others by the following acts: February 14, 1873, Sec. 4. (17 Stat., 462); March 3, 1875. (Sec. 13, 18 Stat., 451); June 16, 1880. (21 Stat., 248); March 3, 1883. (22 Stat. 624).

Findings of fact No. VI, Record, p. 50.

V.

Brief of the Argument.

The Parties. There is no controversy as to the status of the individuals constituting the Cherokee Nation, who reside in the Indian Territory, west of the Mississippi; nor as to the Nation itself considered as an Indian State—the individual and State will be conceded to be within the descriptions of:—

Cherokee Nation *vs.* Georgia. 5 Peters, 1.
Holden *vs.* Joy. 17 Wall., 237.
Elk *vs.* Wilkins. 112 U. S., 94.

—that is to say that the individuals owe a paramount allegiance to the Cherokee Nation and are not subject to the jurisdiction of the United States, and that in their aggregate or organized capacity they are a State or Nation in such sense that they make treaties and must be dealt with under the terms and limitations only of such treaties as may have been made.

The position of the claimant and appellant is that the individuals composing its organization are Indians belonging to the Cherokee Nation and not citizens of the United States, of Cherokee Indian descent; that its organization possesses those essentials of an Indian State, by which it may claim and hold the allegiance of its subjects, or citizens, and that it is that Eastern Band of the Cherokee Nation with which the United States heretofore held treaty relations. Petition, Record, p. 3.

These positions of the appellant are denied by the appellees—the United States and the Cherokee Nation—and on the part of the appellees it is insisted that the individuals composing the Appellant Band are citizens of the several States of their residence and of the United States.

The Cherokees constituted one Nation and held one country and single territorial jurisdiction east of the Mississippi river down to the conclusion of the treaty of July

8, 1817, (7 Stat., 156), when certain of their lands east of the Mississippi were exchanged for a like quantity of lands west of the Mississippi on the Arkansas and White rivers in the then Territory of Arkansas.

Treaties of November 28, 1785 (7 Stat., 18; July 2, 1791 (7 Stat., 39; February 17, 1792 (7 Stat., 42); June 26, 1794 (7 Stat., 43); October 2, 1798 (7 Stat., 62); October 24, 1804 (7 Stat. 218); October 25, 1805 (7 Stat., 95); January 7, 1806 (7 Stat. 101); September 11, 1807 (7 Stat., 103); March 22, 1816 (7 Stat. 138); March 22, 1816 (7 Stat., 139); September 14, 1816 (7 Stat., 148; July 8, 1817. *Supra.*

The last named treaty was with "the chiefs, head men and warriors of the whole Cherokee Nation" (Art. 1). It had in view the fact that a part of the citizens of the Nation had, by leave of the President, settled upon the lands of the United States on the Arkansas (Preamble) and the probable separation of the Nation into two parts and made dispositions accordingly. (Arts. 3 and 4).

The *actual* division of the Cherokee people by reason of the emigration to the Arkansas was again recognized by the treaty made February 27, 1819 (7 Stat., 195), and further provision was made out of the general Cherokee estate in favor of the emigrants; final arrangements were made for the division of the annuities (Art. 6). These agreements constituted a settlement and division of interests; it only remained for the United States to give to these on the Arkansas official recognition to constitute them a Nation.

The relative members of the two populations provided for by this treaty (1819) was two-thirds remaining East, one-third to the west of the Mississippi, Art. 6.

The treaty concluded May 6, 1828 (7 Stat, 311), recognized the Cherokee Indians west of the Mississippi river as a Nation. It was with the "chiefs and head men of the Cherokee Nation of Indians west of the Mississippi."

They were denominated "The Cherokee Nation West of the Mississippi." (Art. 8.) The United States by that treaty negotiated with them on the jurisdictional questions of National Estate and National Boundaries. Articles 1, 2 and 3).

The treaty, or "Articles of Agreement and Convention," adopted February 14, 1833 (7 Stat. 414), was with the "Cherokee Nation of Indians West of the Mississippi" and concerned their national estate and boundaries.

The contention of the appellant that by force of the said treaty of 1828 the divided people were recognized as seperate Nations, and became by their own agreements and the consent of the United States, so constituted, is admitted. The contention that the Appellant Band is that one of these two Nations which held its country and exercised its governmental functions to the eastward of the Mississippi is denied.

There were no negotiations with that major part of the Cherokee Nation which remained in possession of the ancient estate east from the date of the treaty of 1819, until the 29th December, 1835, when that agreement was concluded which is generally called the treaty of New Echota, and which, with its supplementary articles was proclaimed May 23, 1836. 7 Stat., 478.

This treaty was made at New Echota, in the State of Georgia, and within the territory of the Cherokee Nation east of the Mississippi. The authority of the commissioners on the part of the United States was "to conclude a treaty with the Cherokees East." (Preamble.) Instructions to the commissioners, Ex. Doc., 120, Senate, 25 Cong., 2d session, pp. 100–4.

The object declared in the preamble was to get the Cherokees out from under the claimed jurisdiction of the States "and with a view to reuniting their people in one body." (Preamble.)

The fourth instruction to the Commissioners declares

"4. The great object being to insure the entire removal of the tribe, no reservations will be granted. * * *" Ex. Doc. 120, *supra*, 102.

The agreements were:

"Article 1. The Cherokee Nation hereby cede, relinquish and convey to the United States all the lands owned, claimed and possessed by them east of the Mississippi river, * * *."

Article 2 recited the grant of land west of the Mississippi by the treaties of 1828 and 1833, and because of apprehension that the quantity might be found insufficient on the removal of the whole nation west, provided for the sale to the Cherokees of an additional tract.

"Article 16. It is hereby stipulated and agreed by the Cherokees that they shall remove to their new homes within two years from the ratification of this treaty." * * *."

There was a census of all the Cherokee people remaining east taken and completed the year of the making of the treaty of New Echota. (Article 15.) The number was 16,743. Ex. Doc., Senate 120, p. 535, *supra*.

"The number of Indians who remained [east] immediately after the general removal incident to the treaty of 1835–36, was between 1,100 and 1,200, some of whom have since joined the Nation West." Finding No. 1, Record, p. 48.

The act of union between the Eastern and Western Cherokees celebrated in 1839, and the preamble to the constitution of the reunited nation declaring that union, are already quoted. (p. *supra*.) These documents in full, together with some of the general laws of the nation, are found in Report No. 1098. Ho. of Reps. 27 Con., 2d. session.

These treaty agreements and the acts done accordingly

—abolished all jurisdiction, territorial and political of the Cherokee Nation east of the Mississippi, there was thenceforward no Cherokee Nation, tribe or band, save only the Cherokee Nation of Indians in the Indian Territory.

"The Nation ceased to be a landholder within the States on the ratification of the treaty." 4 Opinions, 438.

VI.

The individuals composing the appellant band, so far as they may be of Cherokee blood, are citizens of the States of their residence and of the United States.

By the 8th article of the treaty of July 8, 1817 (7 Stat., 156), a reservation of 640 acres was given out of lands surrendered to the States, east of the Mississippi, to such heads of Cherokee Indian families as might "wish to become citizens of the United States."

This provision was continued and extended by the 3d Article of the treaty of 1819, 7 Stat., 196.

By Article 3 of the same treaty reservations were declared in favor of thirty-one persons specially named in a list attached to the treaty. p. 198.

Article 12, treaty of New Echota, is in these words:

"Those individuals and families of the Cherokee Nation that are averse to a removal to the Cherokee country west of the Mississippi, and are desirous to becoming citizens of the States where they reside, and such as are qualified to take care of themselves and their property, shall be entitled to receive their due portion of all the personal benefits accruing under this treaty for their claims, improvements and *per capita*, as soon as an appropriation is made for this treaty."

That, under the reservation and citisenship clauses of the treaties of 1817 and 1819, rights had been asserted and accrued, is shown by the provisions of Article 13 of the treaty of New Echota providing indemnity for viola-

tions of the right, and confirming generally all reservation rights taken in pursuance of the treaties of 1817 and 1819.

Schermerhorn, the commissioner on the part of the United States to negotiate the treaty of New Echota, reported to the Secretary of War, March 3, 1836, that, at the taking of the census of 1835, there were 400 Cherokees residing "out of the Indian country in that part of North Carolina which was ceded by the treaties of 1817 and 1819." Doc., 120, *supra*, p. 535.

September 12, 1831, or more than three years before the treaty of New Echota was concluded, thirty-six Indians, by power of attorney, constituted one W. H. Thomas their agent under circumstances indicating that they were citizens of North Carolina. The instrument was acknowledged in Haywood county, North Carolina. Ex. Doc. 120, Senate; 25 Cong., 2d session, p. 610.

January 30, 1836, two hundred and twenty-eight persons, Cherokee Indians, residing in the counties of Haywood and Macon, North Carolina, constituted the same W. H. Thomas their agent to proceed to Washington City to attend to their interests in the stipulations of the treaty of New Echota. In purported agreement with certain Eastern Cherokees, based on these powers of attorney, Thomas declared himself "authorized by a portion of the Cherokee citizens of and residing in the State of North Carolina." Ex. Doc. 120, *supra*, p. 616.

April 6, 1837, sixty heads of families, representing three hundred and thirty-three persons, described as Cherokee Indians of Qualla Town, N. C., represented to the commissioners to carry into effect the treaty of December 29, 1835, that they were averse to removal to the Cherokee country west of the Mississippi, and "desire to continue citizens of and subject to the laws of the State of North Carolina where they reside." (Ex. Doc. 408, 29 Cong., 1st session, p. 17.) They are duly certified for citizenship and the other privileges awarded by Article

12 of the treaty of New Echota. Ex. Doc. 408, *supra* p. 14.

In addition to the above number (333) it appears that it was represented to the Commissioner of Indian Affairs by the Superintendent of Cherokee removals, under date of February 28, 1838, that there were two hundred old and infirm Indians who wished to remain. This was permitted by the Secretary of War, if willing to submit to the State laws and able to purchase land. Ex. Doc. 408, pp. 16 and 17.

The number of Cherokee citizens of North Carolina residing at Qualla Town in 1840 was 669, in 1844 it was 782. (Ex. Doc. 408, p. 22.) There were in the whole of North Carolina "at the time a census was taken in 1840, 1059 Cherokees." Ex. Doc. 298, Senate, 29 Cong., 1st session, pp. 180 and 183.

The number in North Carolina in 1883 was 1881. Finding No. 7, Record, p. 51.

There were 311 *heads of families* duly enrolled under the citizenship articles of the treaties of 1817 and 1819. Ex. Doc.

On the basis of five persons to each family this places in the States of North Carolina, Georgia, Tennessee and Alabama, 1555 persons having the status of citizens of the States, before their reinforcement in numbers, by such as elected to take the privilege of citizenship under the 12th Article of the treaty of New Echota.

Before the date of the treaty of New Echota the status of Cherokees, who held lands and claimed citizenship in the States of their residence, had been considered by the Supreme Court of North Carolina and determined in favor of the validity and effectiveness in that behalf of the treaties of 1817 and 1819.

Doe on demise of Eu-che-la, 3 Hawk., 155.

Doe on demise of Yo-na-gus-kee, *Idem.*, 174 (June, 1824.)

The cases were *ejectment*, and the plaintiffs stood on their compliance with the treaties; the defendants had taken possession under patents from the State. In the first of the cases the court found for plaintiff on the issue that his rights, as a reservee and as a citizen under the treaties of 1817 and 1819, had been established. In the second (that of Yo-na-gus-kee), the case was remanded for a new trial because of technical failure in his proof of enrollment.

When these cases were tried, it was the law of North Carolina that, "An alien cannot maintain *ejectment* or any action for the recovery of a freehold."

Barges *vs.* Hogg, Haywood, N. C. R., 558.

In State *vs.* Manuel, Devereaux & Battles' N. C. Rep., Vols. III and IV, p. 20, it was held: "All persons born within the State are born citizens of the State."

Necessarily questions under the reservation and citizenship clauses of these treaties frequently arose in Tennessee.

In Blair *vs.* Pathkiller's Lessee, 10 Tennessee (2 Yerger), 406, Judge Catron held, that "the reservees became citizens. * * * He agrees to become a citizen, upon which condition he is permitted to remain. * * * One object in granting the reserves was to incorporate a portion of the Indians * * * into our society."

In Jones' Lessee *vs.* Evans, 13 Tenn., 323, it was held, that the fact that a person's name was registered with the Cherokee agent for a reservation under the treaties of 1817 and 1819 within the time prescribed, is conclusive evidence that such person possessed the qualifications required.

There was an enrollment in 1883 of all persons claiming to be of Cherokee blood or descent, then living East of the Mississippi. The number returned was 2,956 persons; located, 1,881 in North Carolina; 758 in Georgia; 213 in

Tennessee ; 71 in Alabama ; 3 in South Carolina ; 11 in Kentucky ; 8 in New Jersey ; 5 in Virginia ; 1 in Illinois ; 3 in Kansas ; 1 in Colorado ; 1 in California. Findings No. 7, Record, p 51.

The Cherokee Nation ceased to have either territorial or political jurisdiction East of the Mississippi on the proclamation (May 23, 1836) of the Treaty of New Echota. All persons of the Cherokee blood born since that day within the ancient limits of their Nation, were yet born within the territory and jurisdiction of States and of the United States.

All of the individuals of the Appellant Band of the age of 49 years and under are (without considering the effect of the naturalization of their ancestors by the treaty provisions referred to) controlled by that legal status, which results from birth in and continuous residence under the exclusive jurisdiction of States and the United States.

It is settled doctrine now, that an Indian by blood born a member of one of the Indian tribes, and who has not been naturalized or taxed, though he may have separated himself from his tribe and adopted the habits of the whites, remains an Indian, notwithstanding that provision of the Fourteenth Amendment to the Constitution of the United States which declares "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Elk *vs.* Wilkins, 112 U. S., 94.

The denial of citizenship of the United States in such cases seems grounded on the proposition that though born within the territorial limits of the United States in a geographical sense, they are yet, if born members of an Indian tribe, in the condition of owing allegiance to an alien power, but this cannot be imputed where birth and continual residence is without the jurisdiction of an Indian State and within that of the United States.

The laws, civil and criminal, of the State of North Carolina, have been extended over Cherokees by blood residing there at least since 1838.

In the case of the State *vs.* Ta-cha-na-tah (June Term, 1870), which was on an indictment for murder, the defendant and the person killed both being Indians by blood, the Supreme Court of that State said :

"The first objection taken is to the jurisdiction of the court over the accused, by reason of his being a Cherokee Indian. The objection was not argued by the counsel for the appellant.

"*Prima facie* all persons within the State are subject to its criminal laws, and within the jurisdiction of its courts; if any exception exists, it must be shown. On examination of the Treaty of New Echota, Georgia, on the 29th of December, 1835, between the United States and the Cherokee Indians, we find that, by Article 12, it was provided that individuals and families who were averse to moving West of the Mississippi river, might remain, and become citizens of the States where they resided. Our civil laws have been extended over these Indians, at least ever since 1828 (Rev. Code, ch. 50, sec. 16); and this statute applies as well where the contract is between two Indians, as where one of the parties is white."

Loven Good *vs.* Smith, 7 Jones, 601.

"2. A woman named Uh-wat-tah was offered as a witness on the part of the appellant, and was objected to by the State because she was his wife. She was rejected by the judge.

"It was admitted by the State that the rites of matrimony had never been performed between them according to the laws of North Carolina, or in any other form, but they merely cohabited together as man and wife, which, it was proved, was in accordance with the ancient customs of the tribe, according to which couples were recognized as man and wife. It was also proved that many years before 1866, the tribe had professed Christianity, and that since that time most of the marriages had been solemnized by a justice of the peace.

"There is but one law of marriage in this State, which applies equally to all citizens." * * *

64 N. C., 614.

There is no race disability preventing the acquisition of citizenship by persons of Cherokee blood. If any anciently existed, it was swept away by the act of April 9, 1866, now Rev. Stat., Sec. 1992.

"All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States."

Indians *not taxed* form the sole exception. Indians taxed, not subject to any foreign power, actual or quasi, are embraced by the statute.

The status as to citizenship, of children born within the territory and jurisdiction of the United States, of alien parents, who maintain their native allegiance, was considered by the Circuit Court, District of California, September Term, 1884. Field, Justice, held them to be citizens, saying, "Independently of the constitutional provision (XIVth Amendment), it has always been the doctrine of this country * * * that birth within the dominions and jurisdiction of the United States, of itself creates citizenship."

In Re Look-tin-sing, 21 Fed. Reporter, 905.

The right of expatriation was from the earliest times. American Common Law. It is embodied in Section 1999 of the Revised Statutes.

"A citizen of the United States loses his status as such if he emigrates, carries his family and effects with him, manifests a plain intention not to return, takes up his permanent residence abroad, and assumes the obligation of a subject to a foreign government."

9 Opinions Atty's-Gen'l, 62.

The Constitution of the Eastern Cherokee Nation, adopted in 1827, provides (sec. 2) that when any citizens "shall remove with their effects out of the limits of this Nation, and become citizens of any other government, all their rights and privileges as citizens of this Nation shall cease;" and this was their old law of 1817.

The same provision forms a part of the 2d section of article 1 of the Constitution of the reunited Cherokee Nation, adopted September 6, 1839.

Chief Justice Taney, in Scott *vs.* Sanford (19 How., 393, 404), said:

"Those Indian governments were regarded and treated as foreign governments, as much so as if an ocean had separated the red man from the white; * * * and the people who compose these Indian political communities have always been treated as foreigners, not living under our government * * *

"But they may, without doubt, like the subjects of any other foreign governments, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his Nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people."

The concluding portion of this passage from Chief Justice Taney's opinion is quoted by the court in Elk *vs.* Wilkins, in connection with its discussion and enforcement of the proposition that an Indian who leaves his tribe and settles beyond its jurisdiction and among the whites, occupies the status of a subject of a foreign government who does likewise. This, we take it, is equivalent to a finding that the child of an Indian so situated, born within the jurisdiction of the United States would be a citizen, as would be the case with the child of the foreign emigrant born under the same circumstances.

The finding below (No. 1, Record, p. 49) is, "they are registered and have voted at elections in North Carolina and pay taxes on their real and personal property * *."

The constitution of North Carolina (1868) with respect to taxation and the right of suffrage provides, sec. 3, Art. 3.

"Laws shall be passed taxing by a uniform rule, all moneys, credits, &c., * * * and also all real and personal property, according to its true value in money."

Charters and Constitution, part 2, p. 1429.

The constitution of North Carolina, as to the right of suffrage, Art. 6, sec. 1, provides:

"Every male person born in the United States, and every male person who has been naturalized, twenty-one years old or upwards, who shall have resided in this State twelve months next preceding the election, and thirty days in the county in which he offers to vote, shall be deemed an elector.

Sec. 2. "It shall be the duty of the General Assembly to provide from time to time for the registration of all electors, and no person shall be allowed to vote without registration, or to register without first taking an oath or affirmation to support and maintain the Constitution and laws of the United States, and the constitution and laws of North Carolina not inconsistent therewith."

Charters and Constitutions. Part 2, p. 14–30.

The amended Constitution of 1876 contains the same provisions. Idem, p. 1445.

These provisions are carried into effect by appropriate legislation. Code of N. C., Vol. 2 (1883) Secs. 2671, 2674, 2675, 2680, 2681, 2686, and 2709.

Their memorial of June 26, 1846, declares: "By the constitution and laws of the State they have the right to vote, but exercise it but seldom, lest they should be regarded as identified with one of the political parties and thereby give offence to the other."

Senate Doc. 408, *supra*, p. 15.

But by force of Article 12 of the treaty of New Echota, those Cherokees not already citizens of the States of their residence, by force of the treaties of 1817 and 1819 who remained east of the Mississippi became citizens, and they and their descendants continue to be citizens of the States of their residence and of the United States.

The 14th Article of the treaty at Dancing Rabbit creek with the Choctaw Indians (7 Stat., 333), provided that—

"Each Choctaw head of a family being desirous to remain and become a citizen of the State, shall be permitted

to do so, by signifying his intention to the agent within six months from the ratification of this treaty."

This treaty was proclaimed February 24, 1831.

The following September, Mr. Attorney-General Taney, construing the 14th and 19th articles, takes it for granted that the clause of the 14th article above quoted was effective as a measure of naturalization.

2 Opinions, 462.

Mr. Attorney-General Cushing, advising the Secretary of the Interior upon the question of Indian citizenship as connected with rights under the public land laws, lays it down that "Indians, of course, can be made citizens of the United States only by some competent act of the General Government, either a treaty or an act of Congress, and for example of citizenship conferred by treaty, says:

"So, by one of the stipulations of the treaty of Dancing Rabbit Creek, provision is made according to which Choctaws may become citizens of the United States." Article 14.

7 Opinions, 746.

The chief feature of the treaty of New Echota, because it effectuated the controlling purpose of the United States in making it, was the agreement (Article 16) that the Cherokees should remove.

The sole exception allowed was as to those individuals and families who, being averse to removal, desired "to become citizens of the States where they reside." (Article 12). This evidenced and constituted the assent of the United States to their naturalization as citizens. The act on their part which evidenced their acceptance of the alternative of citizenship rather than removal was their remaining behind.

In the case of Elk *vs.* Wilkins, *supra* (p. 100), this very

question had the consideration of this court. Instancing examples where by treaty or statute, "tribes, or such members of it as chose to remain behind on the removal of the tribe westward," became thereupon naturalized citizens of the United States, the court says: "For example of which see treaties in 1817 and 1835 with the Cherokees, and in 1820, 1825 and 1830 with the Choctaws." 7 Stat., 159, 211, 236, 335, 483, 488.

The provision of the treaty of 1817 with the Cherokees is found in the 8th article. 7 Stat., 159.

The treaty with the Cherokees of 1835, cited by the court, is that which was entered into at New Echota, the 12th article of which, heretofore quoted, provides for the naturalization of those remaining in the States of their residence.

Agreement by treaty is the necessary and usual method of settling the future allegiance or citizenship of peoples brought under new jurisdiction by a change of flags within the territory of their residence. Such is the practice of the United States.

Treaty with the French Republic, 1803, Art. 3; 8 Stat., 202.

Treaty with Spain, 1819, Art. 6; 8 Stat., 256.

Treaty with Mexico, Art. 8; 9 Stat., 929.

The binding effect on them of the treaty of New Echota cannot be denied by the claimants; they have demanded, and from time to time received, the benefits specified in its 12th article (4 Opinions, 437); they cannot separate its provisions, claiming under it what may seem to be of advantage, but eliminating what may seem to stand in the way of present purposes.

"In the construction of a statute, every part of it must be viewed in connection with the whole, so as to make all of its parts harmonize if practicable, and give a sensible and intelligent effect to each. It is not to be pre-

sumed that the legislature intended any part of a statute to be without meaning."

Potter's Dwarris (12 American Rule), 144.
6 Opinions Atty.-Genls., 148, 152, *supra*.

The 12th Article cannot be construed as independent of that major proposition of the whole treaty of New Echota contained in Article 16, nor is there any rule which will permit the elimination from Article 12 of the condition of citizenship.

Objection that the article provides no machinery of declaration, oaths or registry, avails nothing.

The act of April 9, 1866, 14 Stat., 27, R. S., sec. 1992, worked its vast revolution, changing in some States the majority, who theretofore held sole power, into a minority, both as to race and numbers, without so much as the calling of a roll. "Whoever was included within the terms of the grant contained in that act became citizens of the United States without any record of their names being made." Elk *vs.* Wilkins, *supra*, p. 114.

The act of March 3, 1839 (5 Stat., 349), made the Brotherstown Indians, and each and every one of them, citizens of the United States upon a certain report and map being filed with the President.

The act of March 3, 1843 (5 Stat., 646–7), worked the same result by the same simple means with the Stockbridge tribe of Indians.

It results from the composition of the appellant band that, being in their individual capacity, either by naturalization or birth, citizens and residents of States of the United States, and under the sole and exclusive jurisdiction, both as to person and property, of the laws of the States and United States, they cannot, in their aggregate capacity, constitute an Indian tribe, nation, band or state.

Finding of fact No. 1, Record, pp. 42 to 49, gives the data from which the nature of appellant's organization is to be ascertained.

It dates (preliminarily) from December 10, 1868 (Record, 42), was perfected October 13, 1875. (Record, 48). "The organization was effected at the suggestion of the agent of the United States sent down to take the census of the Eastern Cherokees required by the act of July 27, 1868 (15 Stat., 228), so that, as he informed them, they could transact business with the United States Government." (Record, 49). The constitution of the organization seemed to contemplate united affirmative action on three subjects, the advancement of education, the holding of an agricultural fair, and the appointment of representatives to conduct and settle pending business with the United States.

No pretense of territorial or political jurisdiction is set up. No right to prescribe or enforce a penalty is suggested. The commissions of the array of officers provided for were to be attested, not by the seal of the nation, tribe or band, but with that "of the probate judge of the county wherein the council is held." (Sec. 4, Record, p 47.) Oaths of office were to be "administered by an officer of the government of North Carolina, or the United States Government."

It follows from this state of the facts that in effect the claim of the appellant is, that by reason of the abandonment of their nation by their ancestors, they are entitled to an accounting and to a division of the national estate; but whether considered on this ground or conceding for the argument's sake that appellants are Cherokees and are the Eastern Band of the Cherokee Nation, their claims are equally inadmissible.

If they are the citizens or subjects of the Cherokee Nation, they are bound by the treaties their Nation had made, and are concluded by their own laws with respect to property rights.

A treaty binds not only the States making it in their corporate, or general municipal capacity, but includes and

binds every member, subject, citizen and denizen of the State whose agreement it is.

Vattel, Sec. 154, p. 102.

United States *vs.* Earl, 17 Fed. Rep., 75.

The treaty of New Echota was with the Eastern Cherokees; on their own theory of the constituent elements composing their organization it was the treaty of the appellants with the United States.

"The Executive of the United States must therefore regard the treaty of New Echota as binding on the whole Cherokee Tribe; and the Indians, whether in Georgia, Alabama, Tennessee, or North Carolina are bound by its provisions."

4 Opinions, 437.

The finding below is (Finding II, p. 49) that the appellants have received all the *per capita* money mentioned in article 12 of the treaty of 1835–36 (New Echota), and all the removal and subsistence money mentioned in Article 8, has been paid over to them or funded for their use.

Under familiar principles they are estopped from denying the binding force upon them of the whole treaty.

"The North Carolina Indians, in asking the benefit of the removal and subsistence commutation, necessarily admit the binding influence of the treaty on them and their rights. They cannot take its benefits without submitting to its burdens."

4 Opinions, 437.

The Attorney-General (6 Opinions, 148, 152), quoting Vattell, book 2, chap. 13, pp. 214, 215, says:

"Everything, therefore, which is comprehended in the same treaty is of the same force and nature as a reciprocal promise. * * * * It is obvious, therefore, that as a treaty is one fact to be observed and fulfilled in all its conditions, whether of advantage, or disadvantage, neither of the contracting parties can rightfully select one of the articles by reason of the benefits flowing therefrom, and

reject other articles because of the inconvenience involved in their execution."

Among other subjects disposed of by that treaty was the annuity of the Nation, which constitutes one of the matters of claim, and the acquisition of an interest in western lands, the proceeds of the sales of certain of which constitutes the other matter of claim preferred against the defendants.

VII.

The Commuted Annuity.

At the date of the treaty of New Echota the annuity of ten thousand dollars was, as provided by the 6th article of the treaty of February 27, 1819 (7 Stats., 197), paid two-thirds to the Cherokees East and one-third to the Cherokees West of the Mississippi river.

But by the 11th article (treaty of New Echota), the following became thenceforward the law of its status and disposal:

"Art. 11. The Cherokee Nation of Indians, believing it will be for the interest of their people to have all of their funds and annuities under their own direction and future disposition, hereby agree to commute their permanent annuity of ten thousand dollars, for the sum of two hundred and fourteen thousand dollars, the same to be invested by the President of the United States as a part of the general fund of the Nation; and their present school fund, amounting to about fifty thousand dollars, shall constitute a part of the permanent school fund of the Nation."

Article 10 disposing of other funds arising from the sale of the lands of the Eastern Cherokees, as well as of the commuted annuity fund treated of in article 11, above quoted. Provided:

"Art. 10. The President of the United States shall invest in some safe and most productive stock of the country, for the benefit of the whole Cherokee Nation who *have*

removed *or shall remove* to the lands assigned by this treaty to the Cherokee Nation West of the Mississippi, the following sums as a permanent fund for the purpose hereinafter specified, and pay over the net income of the same annually to such person, or persons, as shall be authorized or appointed by the Cherokee Nation to receive the same, and their receipt shall be a full discharge for the amount paid to them, viz., the sum of two hundred thousand dollars in addition to the present annuities of the Nation, to constitute a general fund, the interest of which shall be applied annually by the council of the Nation to such purposes as they may deem best for the general interest of their people."

This is the will and contract of the Eastern Cherokees. The agreements it evidences have never been superseded. The agreement that the annuities shall be invested for those who have removed or shall remove to the lands West of the Mississippi remains the law of the United States and of the Cherokee Nation.

The agreement that thenceforward "all of their funds and annuities" were to be under their own (the Cherokee Nation's) direction and future disposition also stands.

The appellants have confessedly avoided compliance with the 16th article, which bound them to remove to their new homes within two years from the ratification of the treaty.

The condition precedent, of removal to the West, in order to the right of participation in the funds of the Nation was not incidental but fundamental.

The necessity for the removal of the Cherokees was the paramount question of the times. The cases of Cherokee Nation *vs.* Georgia, 5 Peters, 1, and Worcester *vs.* Georgia, 6 Peters, 515, in some measure exhibit that course of legislative and public procedure which evidence the fact that the situation had become intolerable both for Georgia and the neighboring States, and for the Cherokees. The principal portion of the Cherokee country remaining to the

Nation East was within the charter limits of Georgia. That State held the vantage ground of an agreement with the United States made in April, 1802, by which the United States contracted to extinguish, as early as it could be peaceably done, the Indian title within the State. (The Public Domain, p. 81). The acts of her legislature, had they been of force, would have put the whole Cherokee people within her borders out of the pale of the protection of law. (Acts of Dec. 20, 1828, Dec. 19, 1829, and Dec. 21 and 22, 1830). See the case of Cherokee Nation *vs.* Georgia, reported in a separate volume by Richard Peters, Esq., in which are collated and printed in full the acts of the legislature of Georgia on this subject.

"Courts, in construing statutes, may properly recur to the history of the times when it was passed."
U. S. *vs.* P. R. R. Co., 91 U. S., 78.

North Carolina, more humane in method, was equally persistent for removal. The memorial of her General Assembly to the Senate and House of Representatives (January 27, 1834), has the following:

"The extinguishment of the Indian title to this district of country, and the removal of this unfortunate race beyond the Mississippi is of momentous importance to the interest of this State. * * * the right of North Carolina to have this title extinguished by the general government, is strengthened by the policy which has been pursued toward the Cherokees by the States of Georgia, Tennessee and Alabama. They have been driven and are now flying from that portion of their lands lying within the limits of these States, and take refuge within our borders. * * * the effect will be to remove their entire population to our territory.

"The General Assembly submit it to the justice of Congress to determine whether the continued liberality of North Carolina to this unfortunate race shall be thus rewarded."
Doc. No. 71, Ho. of Reps., 23d Cong., 1st Sess.

The first clause of the preamble to the Treaty of New Echota stated the existing difficulties and declared the purpose of "reuniting their people in one body."

Article 1 took every acre of land possessed by them as a Nation from under their feet. Such as remained, made for themselves the bargain contained in Article 12, undertaking to become citizens of the States of their residence, and reserving the right to receive their proportion of all the personal benefits accruing under the treaty. The personal benefits are specified. They are "their claims, improvements and *per capita*."

The maxim is applicable, "*expressio unius est exclusio alterius.*"

Brooms Legal Maxims, 423 (side page 517).

Potter's Dwarris on Statutes, 221, citing Rex *vs.* Cunningham, 5 East., 478.

This clause of the Treaty of New Echota has been considered by the Attorney-General. (4 Opinions, 433). It has been fully executed. Finding No. II, Record, p. 49.

The disposals made of the funds of the Nation by this treaty were complete. The common property (in funds) was continued the property of the Nation, the personal individual property of such as cut themselves off from further connection with their Nation was awarded them, and it was determined just what of the theretofore common estate should be distributed.

These disposals, as made, were in accordance with the immemorial usage of the Nation, and pursued the course prescribed by their written laws.

Article 3 of the act approved May 6, 1817, provides:

"The authority and claim of our common property shall cease with the person or persons who shall think proper to remove themselves without the limits of the Cherokee Nation."

Cherokee Laws, p. 4.

The law adopted June 15, 1825, has this provision :

" Art. 2. The annuities arising from treaties with the United States * * * shall be funded in the National Treasury, and be the public property of the Nation." Ibid., p. 45.

The constitution of the Cherokee Nation East (upon its own contention, the constitution of this appellant), adopted July, 1827, provides :

" Sec. 2. * * * Whenever any such citizen or citizens shall remove with their effects out of the limits of this Nation, and become citizens of any other government, all their rights and privileges as citizens of the Nation shall cease." Ibid., p. 118.

And this provision (hereinbefore quoted) is repeated in the constitution adopted by the reunited Nation, September 6, 1839.

Laws of Cherokee Nation, Art. I. Sec. 2, p. 11.

The Treaty of New Echota has been administered in precise accord with the understanding of its provisions held until a late day by the appellants. The demands of the North Carolina Cherokees, as they were presented in 1846, were summarized by the Commissioner of Indian Affairs as follows :

" 1st. That, as they propose at a future day to emigrate to the West of the Mississippi, provision be made for a home for them there, and for their enjoyment of a fair portion of the general funds of the Nation ; and that, if a separation be made of the tribe West, as expected, these advantages be given to them, in connection with the Old Settlers and treaty party, which divisions of the tribe West they prefer to join.

" 2d. That their claims for pre-emption rights, reservations, spoliations committed on their property in 1838, improvements under the treaties of 1817 and 1819, and for removal and subsistence to the amount of $53.33 each, be allowed to them.

" 3d. That a fair and full proportion of the *per capiat*

allowance under the treaty of 1835 be given to them; and,

"4th. That it shall be left to their own choice when they shall remove west, removal not forming a condition of the payment of their claims."

Message of the President of the United States relative to the internal feuds among the Cherokees; Doc. 298, Senate, 29th Cong., 1st session, p. 17.

At page 180 of the same document, W. H. Thomas, the agent and attorney of appellants, states it as one of the facts of the situation growing out of the treaty of New Echota, that "a permanent annuity, arising under treaties made with the Eastern Cherokees, was commuted for $214,000, and transferred west for the use of the whole Cherokee people west of the Mississippi as a national fund."

At page 182, concluding his summary of the provisions of the treaty, he says:

"Under the 12th Article of the treaty it is stipulated that those who remain under that provision 'shall be entitled to all *the personal benefits of the treaty.*' The term '*personal benefits*,' as here used, signified all benefits of the treaty except the $1.264,000 set apart for the exclusive use of the nation west, and therefore termed national funds."

The amount is made up of the sum of $764,000, which is the aggregate of the several items of national fund tabulated by the agent at page 180, and of the sum of $500,000 deducted from the price of the eastern lands on account of the additional sale of 800,000 acres. The remark of the agent as to this sum and transaction is: "As an inducement to unite at some future period the Cherokee people in the country assigned for their permanent residence west, $500,000 were deducted from the price of the lands east for 800,000 acres west, adjoining the lands occupied by former emigrants, for the tribe west. * * *."

VIII.

The Proceeds of the Sales of Certain Lands.

There is no claim set up by the appellants to a right in any portion of the national estate so long as it remains in land; the demand is made only when there are in hand proceeds of sales.

The treaty of July 1 , 1866 (14 Stat., 799), provided for the sales and agreements which are the subject of this branch of the claimant's case.

Articles 15, 16, 17 and 23 are those which apply. The payments provided for in case of sales are to be "unto the Cherokee national funds"—"to the Cherokee Nation." The 23d Article provided for a reinvestment and redistribution of the amounts of the present and future national fund including the particular fund in controversy, retaining, however, the classification or objects of expenditure (substantially) provided by the 10th Article of the treaty of New Echota. By said Article 23 it is provided:

"All funds now due the nation, or that may hereafter accrue from the sale of their lands, shall be invested in United States registered stocks at their current value, and the interest on all said funds shall be paid semi-annually on the order of the Cherokee Nation, and shall be applied to the following purposes, to wit: Thirty-five per cent. shall be applied for the support of the common schools of the nation and educational purposes; fifteen per cent. for the orphans' fund, and fifty per cent. for general purposes, including reasonable salaries for district officers."

No step in the direction of a compliance with the demand of the claimant could be taken without trampling upon this treaty compact.

Public faith, their own contract with the United States and their kindred, and the law of the United States forbid the diversion of these funds. The Revised Statutes provide (Sec. 2097):

"No funds belonging to any Indian tribe, with which treaty relations exist, shall be applied in any manner not authorized by such treaty or by express provision of law."

IX.

Removal to the Western Lands was a Condition Precedent to any Claim of Right to Such Lands.

They were conveyed to the Cherokee Nation West by the treaty of 1828. (7 Stat., 311.) They were to be the home of the Western Nation and of "those of their friends and brothers who reside in States east of the Mississippi, and who may wish to join their brothers west." Preamble.

Section 8 authorized the promise of special inducements to such of those who yet remained east as would emigrate to the Western lands.

Article 3 of the New Echota treaty agreed to convey, by patent to the "Cherokee Nation of Indians," the lands described in the treaties of 1828 and 1833, as well as the additional tract then agreed to be sold.

This conveyance of the property of the Western people to the Nation in general was a chief cause of the serious difficulties mentioned in the treaty of 1846 hereafter referred to.

The justification alleged was those very provisions of the treaty of 1828 above quoted, and "the general policy of the United States in relation to the Indian tribes and the Cherokee Nation in particular." Treaty of 1846, Art. 4; 9 Stat., 872.

The general policy, we know, was to induce or compel removal to the west. The Kansas Indians, 5 Wall., 752.

Appellants have persistently refused to observe the conditions of removal which gave an interest in the Western lands.

They themselves pointed it out in 1846 that the 800,000 acres, purchased by treaty of 1835, was an inducement to

emigration and for the use of the tribe west. Ex. Doc., 298, *supra*, p. 179.

The lands and funds, the subject of claimant's demand, are conceded to be the property of the Cherokee Nation. It has been shown that their investment as such is upon the agreement of the United States by treaties duly made. Such being the case, the Cherokee Nation, at least against a party claiming as Cherokees, is entitled to settle any controversy arising with respect to them in its own courts and in its own way and time. Their right of self-government has never been disputed. That they retain it for every purpose except where they may, by treaty, have expressly surrendered it, is affirmed in—

Cherokee Nation *vs.* Georgia, *supra*.

Worcester *vs.* State of Georgia, 6 Peters, 515.

Article 5, treaty of New Echota, in recognition of this principle, bound the United States—

"To secure to the Cherokee Nation the right by their own councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country, belonging to their people or such persons as have connected themselves with them."

Article 13 of the treaty proclaimed July 27, 1866, repeated this assurance of protection for the jurisdiction of the courts of the Nation, and the 18th article of that treaty; evidencing by clear intendment the understanding of all concerned, that all recognizable Cherokee interests had become vested in the Nation, authorized it by its National Council to sell any lands owned by Cherokees in Arkansas and in States east of the Mississippi. 14 Stat., 799.

X.

The Treaty of 1846 *made no change in the settlement in favor of Cherokees remaining East provided for by that of* 1835.

Between the treaty of New Echota and that of July 19, 1866, there was but one compact between the United States and the Cherokee Nation, that of August 6, 1846 9 Stat., 871.

The appellant founds something of its demand on the phraseology of Article 10 of that treaty, which reserved to Cherokees residing in States east of the Mississippi any rights they might have under the treaty of 1835; and on the concluding words of Article 4, which embracing all of the lands of the Nation, declares that "they shall be and remain the common property of the whole Cherokee people themselves included."

The inducement to make this treaty was the existence of serious difficulties between different portions of the people "*constituting and recognized as the Cherokee Nation of Indians.*"

The object was a speedy settlement and the restoration of peace and harmony by having an end of separate claims to interests in the National Estate.

The scope of the 10th article is limited to such rights or claims as the Cherokees residing east of the Mississippi "had or may have, under the treaty of 1835 and the supplement thereto."

Its propriety was suggested by the fact that none of the special or general provisions in favor of those who chose to remain East and become citizens of the States of their residence as made in Article 12 of the treaty of 1835, had at the date of the treaty of 1846 been fulfilled. In fact Article 9 of the last named treaty made the final adjustments on which the *per capita* of Article 12 was paid.

This the Court below found to be the fact (Finding No. 2, p. 49). Appropriations for the satisfaction of the amounts reserved for those remaining East and generally for that treaty were not made until after the proclamation of the treaty of 1846.

Act of July 29, 1848, secs. 4 & 5 (9 Stat., 294); Act of

August 7, 1848, (9 Stat., 339), Act of Sept. 30, 1850, (9 Stat., 556, line 16); Act of February 27, 1859, (9 Stat., 572); Act of March 3, 1851, (9 Stat., 617); Act of February 27, 1851, (9 Stat., 573); Act of May 31, 1854, (10 Stat., 291); Act of August 4, 1854, (10 Stat., 558); Act of July 31, 1854, (10 Stat., 300); Act of March 3, 1855, (10 Stat., 700); Act of August 1856, (11 Stat., 92); Act of June 14, 1858, (11 Stat., 362); Act of July 27, 1868, (15 Stat., 228); Act of March 3, 1875, (18 Stat., 447); Act of August 15, 1870, (19 Stat., 197); Act of March 3, 1877, (19 Stat., 291).

That provision of Article 4 (the concluding lines) which declares that the lands which constituted the National Estate, "shall be and remain the common property of the whole Cherokee people themselves included," and that clause of Article 1 of the same treaty, in these words, "That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit," are not to be construed as setting up any new rule of land tenure among the Cherokees, nor as vesting an interest in the lands of the Nation in any party or person not a recognized party to the negotiation. Inspection of the treaty will show that the difficulties and disagreements for which a remedy was sought and found by the treaty were present within the national boundaries, and that they were all represented in the negotiation. Upon the specification of the parties, found in the recital preliminary to the preamble, and the formal designation of the delegations executing the instrument by their signature (9 Stat., 876), the appellants are excluded as parties. If there was the slightest doubt on this score it would be removed by reference to the official history of the times. Preliminary to the treaty of 1846, the several parties constituting the Cherokee Nation had, by memorial and otherwise, laid their grievances and claims before the Government of the United States.

William H. Thomas, acting as the agent and attorney of the Cherokee citizens of North Carolina, had also presented the claims of his clients for what they alleged to be due on final settlement under the treaty of 1835.

These several papers, with their exhibits, accompanied by a statement and review of their contents by the Commissioner of Indian Affairs, in the form of a report to the Secretary of War, which report was duly approved by that officer, were, on the 13th of April, 1846, sent to Congress by the President with his message of that date.

Ex. Doc. 298, Senate, 29th Cong., 1st Session, heretofore referred to, contains the message and documents. This contemporary elucidation by the parties themselves of the rights they claimed, and of the wrongs of which they complained, establishes that the parties in interest claiming anything as members of or belonging to the Cherokee Nation, were the parties soon after enumerated in the treaty of that year, viz., "The Western Cherokees or Old Settlers." (P. 3.) "The treaty party" (p. 10) and the John Ross or Government party (p. 13). The memorial or statement of the Cherokee citizens of North Carolina (p. 16), is in effect a repudiation of any claim of rights, in either the lands or funds of the Nation. It expressly specifies those particular awards to them under the treaty of New Echota, which were reserved to them by the general saving clause of Article 10 of the treaty of 1846, and which, it was found by the court below, have long since been paid and settled.

Later on (June 25, 1846), the Cherokee Indians residing in North Carolina, sent to Congress a separate memorial, in which, presenting with elaboration their claims and demands under the treaty of 1835, they refrain from any intimation of right to claim either of the funds now in controversy; they insist on their citizenship of North Carolina, and founded their demands on the 8th and 12th articles of that treaty, viz., personal benefits, and removal

and subsistence money. Ex. Doc., 408, Senate, 29 Cong., 1st Session.

We repeat it, the treaty of 1846 follows exactly upon these lines, and it has been executed on that interpretation.

The claim of the appellant rests at its beginning point, on a fundamentally erroneous conception of the interest which an Indian, as an individual, may claim or have in the national or tribal estate. It seems to be conceived that there is some rule of Indian polity by which whenever any portion of the common national estate becomes personalty in divisible form, that it vests under a per capita rule in the individuals of the nation. That provision of the New Echota treaty (Art. 15) which provided for a distribution among all the people belonging to the Cherokee Nation East, of the purchase money of the eastern lands, remaining after certain specific funds and expenditures had been provided for, is relied upon as proof of the practice. But it is clear that instead of this it required a compact to authorize such distribution among the members of the Nation East. Treaties and laws will be searched in vain for an instance before or since of such *per capita* distribution. It was deemed necessary, in order that such as determined to remain in the States might be participants, to enumerate this benefit, under the name of *per capita* (in Article 12) as one of the funds they might enjoy; and so exceptional was this, and the other beneficial provisions of that article, that in the treaty of 1846, it was found necessary, in order to include the Cherokees then residing in States east of the Mississippi river in the benefits of Article 9 of that treaty, to insert for them the saving provision of Article 10. The closing words of Article 9 are clear; the sum left over for *per capita* distribution was to be paid to "all those Cherokees residing east at the date of said treaty, and the supplement thereto" (1835 and 1836), yet Article 10

was found to be needed to include those remaining east.

Examination of Article 4 of the treaties of 1846 will show that the Eastern Cherokees referred to in the basis of settlement there formulated, were "*the Cherokees emigrating under the treaty of* 1835." 9 Stat., p. 873, middle of page.

Not forgetting that the fund here in controversy (commuted annuity) had, in the treaty of New Echota, a name given to it and a particular investment and ownership provided for it, and that the lands, the proceeds of which are demanded, were as specifically vested as to title and ownership, we deny that any general words in a subsequent treaty can have the force of either repeal or amendment. "Implied repeals are not favored. The implication must be necessary. There must be a positive repugnancy between the provisions of the new laws and those of the old."

Ex parte Crow Dog, 109 U. S., 570.
Wood *vs.* The United States, 16 Pet., 342.
Davies *vs.* Fairbairn, 3 How., 636.
United States *vs.* Tynen, 11 Wall., 88.
State *vs.* Stoll, 17 Wall., 425.

Finding No. 2 (Record p. 49), determines that *after* 1846 settlement was made with the Cherokees remaining east; they set up no claim to any part of the annuity fund: from 1846 to 1866 no such claim was preferred. In the latter year another general treaty was concluded (14 Stat., 799). Its provisions covered every general interest of the Cherokee Nation and people ever the subject of negotiation with the United States. There was no mention of Cherokees east: they had been settled with. (Finding 2.) It disposed of the commuted annuity fund (Art. 23), and of the fund to arise from land sales, then first authorized, and made such disposals as were and are positively repugnant to the claimed legisla-

tion on these subjects by the treaty or 1846: there had been no execution of the treaty of 1846 on the lines of the appellants' contention; the funds and interests remained subject to disposal. They were (July 19, 1866) disposed of in such form as unequivocally to revoke, repeal and annul any contrary disposition of them theretofore made.

The said Article 23 (14 Stat., 805) is the law of the land. If the appellants will insist that they are of the Cherokee Nation, it is their law, and the claims they prefer are in derogation of it. If they are citizens of the United States it is their law and settlement. Of its own force as the law of the land it has finally settled the controversy against the appellants, and did not need what, nevertheless has been enacted, that provision of the Revised Statutes which orders that: "No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty." Sec. 2097.

So far as the binding effect of these treaties is concerned, it is immaterial whether the assailant of their provisions be one of the parties to their negotiation, as the claimant here asserts itself to be, or a stranger; as long as the treaties subsist they are the supreme law of the land, and the courts can no more go behind them for the purpose of annulling their effect and operation than they can go behind an act of Congress.

Fellows *vs.* Blacksmith, 19 How., 367.

"Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision."

Foster *vs.* Neilson, 2 Peters, 253, p. 314, cited.

The distribution, investment and disposal of the annuities, money and proceeds of the sale of land made by the

Eastern Cherokees through the agreements and stipulations of the treaty of New Echota, were executed by the law-making power of the United States, through the appropriations made by the act approved July 2d, 1836. 5 Stat., 73.

The provisions for conveying to the Cherokee Nation by a title in fee simple the lands, the proceeds of which constitute in part the subject of the claimant's demand, were executed by the making and recording of the patent of the United States before referred to.

Treaty stipulations which import a contract, when executed by the legislature, "become a rule for the court."

Foster *vs.* Neilson, *supra.*, p. 314.

"* * * the stipulations of treaties, so long as they remain unaltered, cannot fluctuate with the changing conditions of the parties. They cannot mean one thing one year and another thing another year. A change in the condition of the parties may be a very good reason for changing the stipulations themselves; but not for varying the construction of stipulations of a fixed character."

1 Opinions, 645, 647, cited.

XI.

Acts of Congress relating to individuals of Cherokee blood remaining East of the Mississippi after the treaty of New Echota.

Appellant cites certain acts of Congress as relating to and recognizing the separate existence of the claimants as continuing to be a part of the Cherokee Nation of Indians.

The contention is that certain legislation enacted since 1835 confirms the position that claimants are a part of the Cherokee Nation; and that they are the Eastern Band of the Cherokee Nation brought into existence by the separation which was effected by the treaty of 1817.

The first act, which by its own terms referred exclu-

sively to Cherokees remaining East, was that of July 29, 1848. 9 Stat., 264.

The treaty of New Echota had fixed the cost of removal and one year's subsistence at $53.33 per head (Art. 8), and this was one of the items to be deducted from the sum of the purchase money in ascertaining the amount remaining for *per capita* distribution. (Article 15.) Those remaining East under the agreements of article 12 contended that this item was one of the "*personal benefits*" of that article which they were entitled to receive without removal to the West.

This claim was steadily denied by the executive departments.

Ex. Doc., 298, *supra*, p. 18.

Report No. 391, House of Reps., 28 Cong., 1st Sess., p. 29.

4 Opinions, 435–440.

The said act of July 29, 1848, addressed itself to the disposal of the removal and subsistence fund which, under the view still prevailing that all Cherokees remaining East should be removed to the West, was retained by the United States that it might be available for that use; but it was the money of the Cherokees, and there was also to be considered the question of disposing of the interest equitably due. Two sections (the 4th and 5th) of the act deal with this matter. The 4th section required that a census be taken to include every member of every family that remained behind, whereupon the Secretary of the Treasury was directed to set apart a sum equal to $53.33 for each individual so enrolled and to pay interest at six per cent. per annum on such *per capita* from May 23d, 1836.

The fifth section required the Secretary to pay the principal sum ($53.33), or so much as might be necessary, to any individual who might thereafter desire to remove and join the tribe West of the Mississippi.

This legislation dealt with the North Carolina people as individuals, in line with the purposes of the 12th article; it was the strongest possible reassertion of the supreme purpose of the treaty of New Echota, as expressed in the 16th article, viz.: the blotting out of the Eastern Nation, both as a tribe and as a people, by effecting their removal to the West, and it negatives any presumption that during the twelve years that had elapsed since the treaty of New Echota was executed there had grown up any purpose either to recreate an Indian State in North Carolina, or to recognize such Cherokees as there remained for any other purpose than to unite them with the Nation.

Under this act the census of 1848, commonly called the Mullay roll was taken.

The next act having to do with the Cherokees remaining East was that approved February 27, 1851, which appropriated $1,500, "for expense of an agent to collect information to enable the Department to execute the law of Congress providing for the *per capita* payment to Cherokees, under the treaty of eighteen hundred and thirty-five, so far as relates to those Indians East of the Mississippi." 9 Stats., 573.

Thereupon followed the act approved February 27, 1851 (9 Stats., 587), appropriating one thousand dollars "for payment of per diem of a special agent * * * for the purpose of paying off Indians in the old States, and particularly the North Carolina Indians, their removal and subsistence fund."

The act of May 31, 1854 (10 Stats., 291), was for payment of the services of an agent employed in paying Cherokees who remained in North Carolina. what was due under act of July 29, 1848, and this was the purpose of the act of August 4, 1854. 10 Stats., 558.

Act of July 31, 1854, sec. 8 (10 Stats., 333), made an appropriation to pay certain individuals entitled under

the act of July, 1848, but who had been omitted in a former enumeration, and this was supplemented to the same end and purport by the act of August 18, 1856 (11 Stats., 92) These acts are elucidated by Mr. Attorney-General Cushing.

8 Opinions of the Attorneys-General, 182.

This brings us to the act approved March 3, 1855, (10 Stats., 700) the third and fourth sections of which have to do with Cherokees remaining in North Carolina.

The fourth section is simply corrective of former legislation (act July 31, 1854, *supra*) with respect to *per capita* payments.

It was itself faulty in referring "to the roll of D. W. Siler instead of to that of John C. Mullay."

8 Opinions, 182.

The provisions important to the gist of this inquiry are those contained in the third section. They are—

1st. That the Secretary of the Interior "cause to be paid to the North Carolina Cherokees embraced in the roll of John C. Mullay, or the legal representatives of such of them as have died since their enrollment, the sum of fifty-three dollars and thirty-three cents, respectively, for the expenses of their removal and subsistence, now held in trust by the United States, according to the terms of the fourth section of the act of July 29, A. D. 1848." * * *

2d. But upon condition "that each and every Indian so receiving such payment in full shall give his assent thereto."

3d. But this upon further condition "that said Secretary shall be first satisfied that the State of North Carolina has, before such payment by some appropriate act, agreed that said Cherokees may remain permanently in that State, anything in the treaty of eighteen hundred and thirty-five and six to the contrary notwithstanding."

This legislation is definite to the following intents. That the legislative department had been brought to consider the removal and subsistence fund provided for in Article 8 of the treaty of New Echota as a *per capita* or personal right which accrued to all such individuals as were of the Eastern Cherokees at the date of that treaty. The requirement was that the amount be paid to the "North Carolina Cherokees embraced in the roll of John C. Mullay, or the legal representatives of such of them as have died since their enrollment."

The descendants, those born since the treaty, save as they shared in the one sum of $53.33, to be paid to the estate of a deceased ancestor, were not recognized as having rights in the treaty funds.

As to those entitled, the Mullay enrollment was made the standard. The purely individual (not tribal or band) character of the fund and transaction is evidenced by the condition that each person should decide for himself whether or not to accept the payment.

But the material condition is that which holds every provision of the section subject to the consent of the State of North Carolina, that they might remain within her borders; this assent to be evidenced "by some appropriate act" waiving those provisions of the treaty of 1835–6 to the contrary This provision is a legislative admission that the faith of the United States pledged to the several interested States by the treaty of New Echota, to blot out the Cherokee State East of the Mississippi, was to be kept with North Carolina, unless she by solemn act released the bond.

This is the sum of all the legislation had with reference to Cherokees remaining East from December 29, 1835, when their tribe surrendered jurisdiction there, down to July, 1868, a period of more than thirty-two years. It was all based upon and to give effect to the act (July 29, 1848), which set guard around the fund created by a pro-

vision of the New Echota treaty for the removal of Cherokees to their own country.

The United States was without power to enforce the contract of removal found in the 16th section of that treaty, as against those who had elected to abide by the provisions of the 12th section, but persuasive effort was continually made to unite the whole Cherokee people within the national boundaries. To this end, Article 2 of the treaty of 1846, abolishing party distinctions, declared amnesty for past offences, and earnestly invited all Cherokees then out of the Nation to return to their homes. 9 Stats., 871.

The act of 1848 was a natural effort to aid the purposes of that article.

The legislation beginning with the act of July 27, 1868 (15 Stat., 228), has features different from that of 1848. The second section provides for a still further enrollment of the North Carolina or Eastern Cherokees, for the purposes of payments due. The act of 1848, for the payment of interest on the sum set apart for removal and subsistence, was in force.

The war of the rebellion had cut the North Carolina people off from correspondence with the general government for a number of years; there was a considerable sum to be paid over.

The third section is as follows:

"That hereafter the Secretary of the Interior shall cause the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians."

We are less concerned with what this statute purports to do, than we are to have it very clearly appear that certain things necessary to make it of even seeming use to the claimant were not done, or attempted to be done, by it.

It did not declare the North Carolina Indians to be of the Cherokee Nation, nor that they were the Eastern Band or any band of that Nation.

It did not in any form so much as refer in connection with them to any fund of the Cherokee Nation, or attempt to make any change in the treaty disposition of the same.

It did not purport to alter, amend or unsettle any existing treaty provision with the Cherokee Nation, or to reduce or amend its powers of self government.

We remember the rule that the courts take notice of and follow the lead of the political branch of the government in the matter of the recognition of Indian tribes; but in view of the rule that laws are not to be so construed as to lead to absurd consequences (United States *vs.* Kirby, 7 Wall., 482), we may insist that there was no purpose by the act of 1868 to attempt the creation of an alien Indian State out of citizens of the United States.

There is nothing affirmative in terms in the act, save only the direction "to take the same supervisory charge," &c., "as of other tribes of Indians," the purpose being to take charge of such payments and unsettled business as still remained between these parties and the United States.

The implication is, as the fact was, that it concerned a people not theretofore under charge of the Department of Indian Affairs, and not having a tribal organization.

The Cherokee Nation East had and maintained a constitution and body of laws up to 1835. Were claimants unaware of their existence?

December 10, 1868, they made their first attempt at organization. November 28, 1870, they attempted the formation of a constitution. It was not until October, 1875, that they agreed upon one that was satisfactory.

Information of the act of 1868 was conveyed to the supposed subjects of it, by the agent appointed to make the enrollment provided for in the 2d section.

The finding below was (Record, top of page 49):

"The organization was effected at the suggestion of the agent of the United States, sent down to take the census of the Eastern Cherokees required by the act of

July 27, 1868, ch. 259 (15 Stat. L., 228), so that, as he informed them, they could transact business with the United States Government."

Considered in connection with existing treaties, the rule of interpretation by which the act of 1868 should be judged, has been found by this court.

"The Cherokee Tobacco" case, 11 Wall., 616, stated with a lack of reserve which at the time startled the profession, the extreme doctrine that a treaty was as liable to abrogation by act of Congress as was another act of Congress.

In the United States *vs.* Forty-three Gals. Whiskey, 108 U. S., 491, the court again having under review a question involving the construction of a statute and a treaty with an Indian tribe, said (p. 496):

"The laws of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language."

The opinion concludes:

"The case of the Cherokee Tobacco Tax, 11 Wall., 616, cannot be treated as authority against the conclusions we have reached.

"The decision only disposed of that case, as three of the judges of the court did not sit in it, and two dissented from the judgment pronounced by the other four."

There is no conflict between the act of 1868 and the treaties. Any interpretation of the provisions of the act "would be rejected which imputed to Congress an intention to disregard the plighted faith of the Government; * * * the rule is well settled that repeals by implication are not favored and are never admitted where the former can stand with the new act."

Chew Hong *vs.* United States, 112 U. S., 536–549.
Ex parte Yerger, 8 Wall., 85, 105.
Wood *vs.* United States, 16 Pet., 342, 362.

State *vs.* Stall, 17 Wall., 425, 430.
Ex parte Crow Dog, 109 U. S., 556, 570.
Arthur *vs.* Horner, 96 U. S., 137, 140.
Hurford *vs.* U. S., 8 Cranch, 109.

XII.

Lands now owned by Cherokees in North Carolina.

Other legislation of moment is that which relates to the title and the survey of certain lands in North Carolina.

One William H. Thamas, acting under powers of attorney from individuals who remained in North Carolina, had collected for them *per capita* funds accruing under the 12th article of the treaty of New Echota, and under the act of July 29, 1848, and it seems, under agreements with them, had invested the sums so collected in lands, taking title in his own name. He became insolvent and insane; his judgment creditors had levied executions upon the lands purchased with the money of his clients of Indian blood. Having assumed "supervisory charge," it of course followed that the United States was called upon to fight any battle in which these people might be engaged.

The act of July 15, 1870, sec. 11 (16 Stat., 362), authorized them, under the name and style of the Eastern band of the Cherokee Indians, to institute suits for the recovery of the lands so purchased for them.

The act of June 23d. 1874 (18 Stat., 213), provided for paying the expenses of the survey of the land of the "Cherokee Indians of North Carolina."

The act of March 3d, 1875 (18 Stat., 412), appropriated a sum of money to pay the costs in the case of William H. Thomas and others.

The act approved March 3, 1875 (18 Stat., 447), diverted from its original purpose the fund set apart by the act of July 29, 1848, and devoted it for the use of the "Eastern Band of the Cherokee Indians," in perfecting titles to them

and to paying costs; to purchasing and extinguishing titles of any white persons within the general boundary allotted them, and for their education, &c.

The act of August 15, 1876 (19 Stat., 197), completed the transfer to other purposes than that for which it was created of the removal and subsistence fund.

Of all this legislation (subsequent to act of July 27, 1868), it is to be remarked, that there is not the slightest suggestion that there was any other fund or interest appertaining to the North Carolina people, than that set apart for their removal and subsistence, and notwithstanding the diversion of that fund in 1875, as late as June 22, 1874 (18 Stat., 141), appropriation was made for the transportation of North Carolina Cherokees to the Indian Territory.

Ex. Doc., House Reps., No. 197, 47 Cong., 1st Sess., exhibits in some detail the history of the land transactions to which the acts of Congress quoted above refer. It appears that the land, the subject of the suit against Thomas and others, was in part purchased by the money of individuals massed into one common fund, the equitable title being vested in the contributors to that fund; the rest of it was purchased with the funds of individuals, for individuals, and the equitable title vests accordingly.

Ex. Doc. No. 196, *supra*, p. 38, par. 3.

That these lands are not Indian lands in any such sense that they are released from the burdens of taxation, or are under any other protection than that which the State laws confer, has amply appeared. They are merely a certain property in lands in the State of North Carolina, belonging to individuals, and to an association of individuals.

They are assessed for taxation as other lands in the State are, and subject to all the penalties provided by law for the enforcement of the levy.

Finding No. 1, Record, p. 49.

XIII.

The William H. Thomas Agreement.

Claimant offers in evidence Ex. Doc. 79, 47 Cong., 2d Sess. (H. R.), and relies among other things on a certain agreement dated at Washington City, May 26, 1836, purporting to be executed by W. H. Thomas, for N. C. Cherokees, and by a delegation for Cherokees who had or would remove to the west.

Looking for the authority of Thomas to act in the premises, it is found set out on pages 4, 5 and 6 of the same document, and is in the form of a power of attorney from 234 individuals, who describe themselves as Cherokee Indians residing "in the counties of Haywood and Macon, of North Carolina." It is dated January 30, 1836, and was acknowledged by the individuals giving the power, as individuals, on the same day, before a justice of the peace of Haywood county.

The authority conferred on the agent by this power was to proceed to Washington, and there to examine the treaty of New Echota, made on the 29th of December preceding, "and if provision be made, or the agent of the United States will yet make provision, in said treaty, for us and our families (such as our said agent shall be satisfied with), we therefore authorize our said agent to sign our names to said treaty; when signed, to be as binding on us, our heirs or assigns, as if we had been personally present at the signing and sealing thereof. We further authorize our said agent (William H. Thomas) to apply for and receive all sums of money due us from the United States, or which may be due us hereafter, payable to us from annuities or stipulations in said treaty."

It is patent upon the face of this paper that it was the act of the individuals who purport to have signed it and of no others, and that it did not purport to bind any others; that, however, it may have been effectual to authorize

Thomas to apply for and receive any *per capita* or "personal benefits" to accrue to his principals under the treaty to which it referred, it could not, and did not, vest him with power to in any manner meddle with the provisions of the treaty of New Echota, for the reason that if his principals were in fact Cherokee Indians, the treaty as made was their treaty and conclusively bound every one of them, or, if then citizens of the United States, it was the treaty of their Nation and bound them.

United States *vs.* Earl, *supra.*

4 Opinions Attorneys-General, 437.

This being the authority under which Thomas assumed to act, it is of little moment, in our view, what he assumed to do by way of modifying the stipulations of a duly proclaimed treaty between the United States and the Cherokee Nation. The chief interest the purported agreement has to us, lies in the admission which the appeal made to it by claimant, confesses, that the treaty itself does not sustain the claimant's demand.

The matter of certain pretensions set up by Thomas under this agreement was by the President referred to the Attorney-General for his opinion in 1845. Replying, Mr. Attorney-General Mason said:

"An agreement entered into by William H. Thomas on the part of the North Carolina Indians and the treaty party is also transmitted. The last mentioned paper bears date three days after the ratification of the treaty, and does not appear to have any title to be regarded as a part of a treaty. * * *

"According to well established principles of law, I am of the opinion that the evidence is not admissible to establish a construction of the treaty, inconsistent with its own provisions, and unauthorized by its language." 4 Opinions, 441.

If the contention that this agreement was to be regarded as either a part of the treaty of New Echota or

as an official and binding interpretation of its provisions, be abandoned, and, instead, it be held that it was a valid contract between the Eastern Nation and the individuals for whom Thomas acted, then it may be replied that the courts of the United States cannot be called upon to enforce an agreement palpably violative of subsisting treaties. It may be further replied that Thomas had no authority to make any agreement for his principals with the Cherokee Nation, or the Eastern Cherokees, but, on the contrary, his authority was to treat with the agents of the United States, and to sign a treaty with them; that there is no evidence that the persons who are said to have signed the purported agreement on the part of the Cherokees who had emigrated, or were expected to emigrate, were authorized so to do; that those whose names appear as so signing were a part of a delegation of twenty persons who executed for their people the treaty of New Echota and the supplementary articles of 1836.

The reason which brought these people to Washington, where the agreement was signed, and the authority they held from their Nation, is recited in the preamble to the supplementary articles (7 Stats., 488), and is as follows: "to make and assent to such alterations in the preceding treaty as might be thought necessary."

They had assented to the alterations found necessary and, three days before the date of this agreement, the amended treaty had been finally proclaimed; as representing their Nation, they were then *functus officio*. It will not be held that there was power anywhere to vest them with authority to bind their Nation either to annul or vary any provision of the treaty just proclaimed. They were directed by the General Council which appointed them "to secure the ratification of the treaty." See letter of Schermerhorn, Ex. Doc. 120–25, Cong., p. 496.

There was neither power in Thomas to make an agree-

ment on any subject with the representatives of the Cherokees, nor power in these representatives to agree with him for any purpose. If it could be held otherwise, still it would follow that his agreement was simply the bargain of the individuals whose power of attorney he held.

Before it could be pleaded here as the basis of claimant's right of recovery something more than proof that such a bargain was made would be necessary.

There is no tender of proof that claimant has become the owner of the contract; the court seems left to whatever it may be able to imagine on that score.

On fundamental principles it is not admissible to appeal to the Thomas agreement to alter or vary subsisting treaties.

The United States was one of the high contracting parties to the treaties here in controversy. There is no suggestion that it participated in the agreement.

The treaty itself clearly defined what should be individual or separate interests, and what should be the general property of the Nation under its control.

If by solemn treaty the defendant Nation had agreed to submit to the conscience of a chancellor, the question as to whether aught was due the claimants from the funds of the Nation, they must have failed. Under the treaties of 1817 and 1819 these claimants or their ancestors took from the common property a generous share of the national effects. Reservations of 640 acres each, the pick and choice of the national estate, fell to many of them—absorbing thousands of acres, by which amount the national estate was the poorer; for the provision of article 5, treaty of 1817, was that the United States would give so much land in the west, acre for acre, "as they have or may hereafter receive from the Cherokee Nation east of the Mississippi."

On what principle may these citizens of the United States, if any of them be yet alive, come forward now and

repudiate that settlement? Do they offer to do equity by the return into the national fund of the estate they took from it, with due accounting for rents and profits for these sixty-five years of their enjoyment. On what principle may their descendants repudiate the acts of their fathers? If the ancestor had remained a Cherokee citizen the descendant could have taken nothing by his death.

"* * * the Indian had no heir or representative (so to speak) but his Nation; and no interest that he had in the one or the other, when living, passed on his death to his child or to his administrator. There was nothing to pass; for his interest as a person in life and being became extinct with him and lapsed to his tribe. His children can claim only as members of that tribe in common with all the other members."

5 Opinions, 330.

By the act of March 3, 1823 (3 Stat., 750), $50,000 was appropriated to purchase tracts of land in Georgia reserved to the Indians in fee by treaties with the Cherokee Indians by the treaties of 1817 and 1819.

The act of May 9, 1828 (4 Stat., 268), appropriated $20,000 for refunding to North Carolina that amount paid by her to extinguish reservations under the same treaties held by Cherokees in that State, March 2, 1829 (Id., 353; a further appropriation of $20,000 was made for the same purpose.

March 2, 1831 (Id., 471), $46,104.50 was appropriated to extinguish claims of the Cherokees to their lands in Georgia; and by the same act $2,100 was appropriat d for purchase of Creek and Cherokee reservations. These sums principally used to purchase individual reservations of Indians, citizens of the United States, indicate the large values the reservee citizens had drawn out of the common fund, and that their numbers were considerable.

We have pointed it out that by their own law, since 1825, the annuities arising under treaties with the United

States were funded in the Cherokee National Treasury, and became "the public property of the Nation." That, by their own treaty of 1835–6, the same annuities commuted to a sum certain was invested as a part of the general fund of the Nation, the proceeds to be "applied annually by the council of the Nation to such purposes as they may deem best for the general interest of their people." These proceeds have ever since been applied to the maintenance of the Cherokee State—its legislative, executive and judicial departments. The claimants persist in declaring themselves a part of the Cherokee Nation of Indians. They ask the court so to find the fact to be. By what authority may they demand to have a share of the national fund handed over to them instead of being used for its proper and lawful purpose, because of their absence from their country? Is it upon the theory that their absence has made the cost of government that much less? If not, what is the theory? The Cherokee remaining in his own country, sharing its fate and faithful to his allegiance, can make no such demand. How can these absentees put their Nation in liquidation and demand distribution?

This is a proceeding to be measured by the law of the land, as the law stood enacted on the 3d day of March, 1883, when the case of the claimant was sent here to be heard, and as it is found to be to-day. The funds involved are an express *trust* in the hands of the United States—the property in them is that of another. There is no right in the United States to waive anything by way of defence of them, and no lawful power to direct or consent to their disposal otherwise than as directed by the several treaties which hold her pledge and agreement with respect to them. This is not the case of a claim against the funds of the United States where forms of reference may be held to import consent or expectation of judgment. It is a cause and matter which puts every agency of the

United States that may intervene under obligation to see that the treaties are executed as made, and where the rule for their interpretation, when allegation is made that the laws have modified them, has been laid down with preconcerted care. "The laws of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language." United States *vs.* Forty-three Gallons of Whiskey, *supra*. There will be found no line of any law which does or purports to change any treaty provision with respect to the subject of this controversy.

If the whole line of statutes enacted since 1835, which do or may refer to Cherokees East of the Mississippi be considered as in *pari materia*, they will be found silent as to the funds and alleged rights here in controversy.

The act of March 3, 1883, which sends the matter here confers jurisdiction to ascertain what rights, "*if any*," subsist. It intimates no intention of vesting the court with power to amend or reform the contract. That would have been a strange proceeding had the effects involved been those of the United States—it would have been an enormity in view of the fact that the property is a trust.

WM. A. PHILLIPS,
Attorney for the Cherokee Nation.

S. S. BURDETT,
Of Counsel.

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117-288

Supreme Court of the United States.

OCTOBER TERM, 1885.

THE EASTERN BAND OF THE CHEROKEE INDIANS, APPELLANT,
vs.
THE UNITED STATES AND THE CHEROKEE NATION, COMMONLY CALLED THE CHEROKEE NATION WEST.
No. 886.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

Supreme Court of the United States.

OCTOBER TERM, 1885.

THE EASTERN BAND OF THE CHEROKEE Indians, Appellant,
vs.
THE UNITED STATES AND THE CHEROKEE Nation, commonly called the Cherokee Nation West.
} No. 886.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

The great question in this case is as to the right of the Eastern Band of the Cherokee Indians to be held and treated as *cestuis que trust* along with the appellees in respect of certain moneys, stock, bonds, &c., held by the United States in trust *for the Cherokee Indians.*